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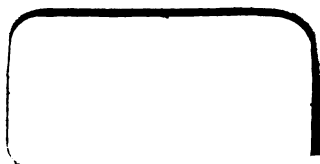
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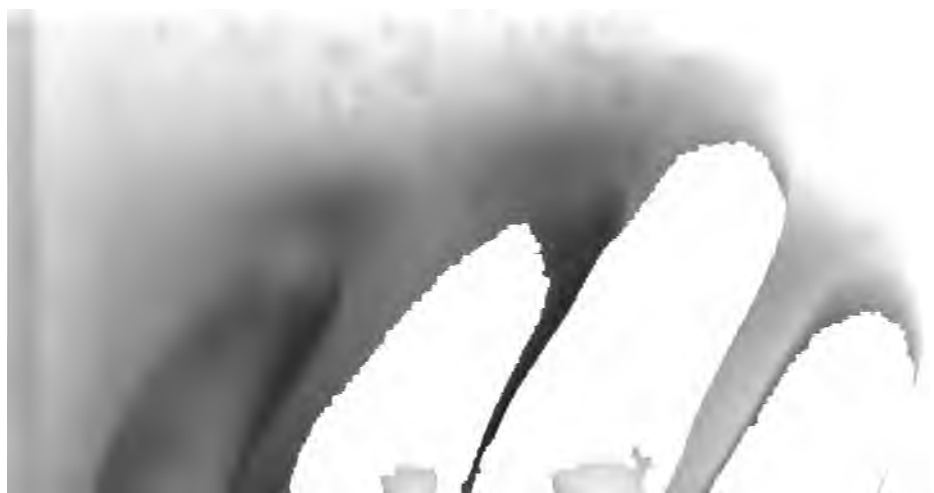
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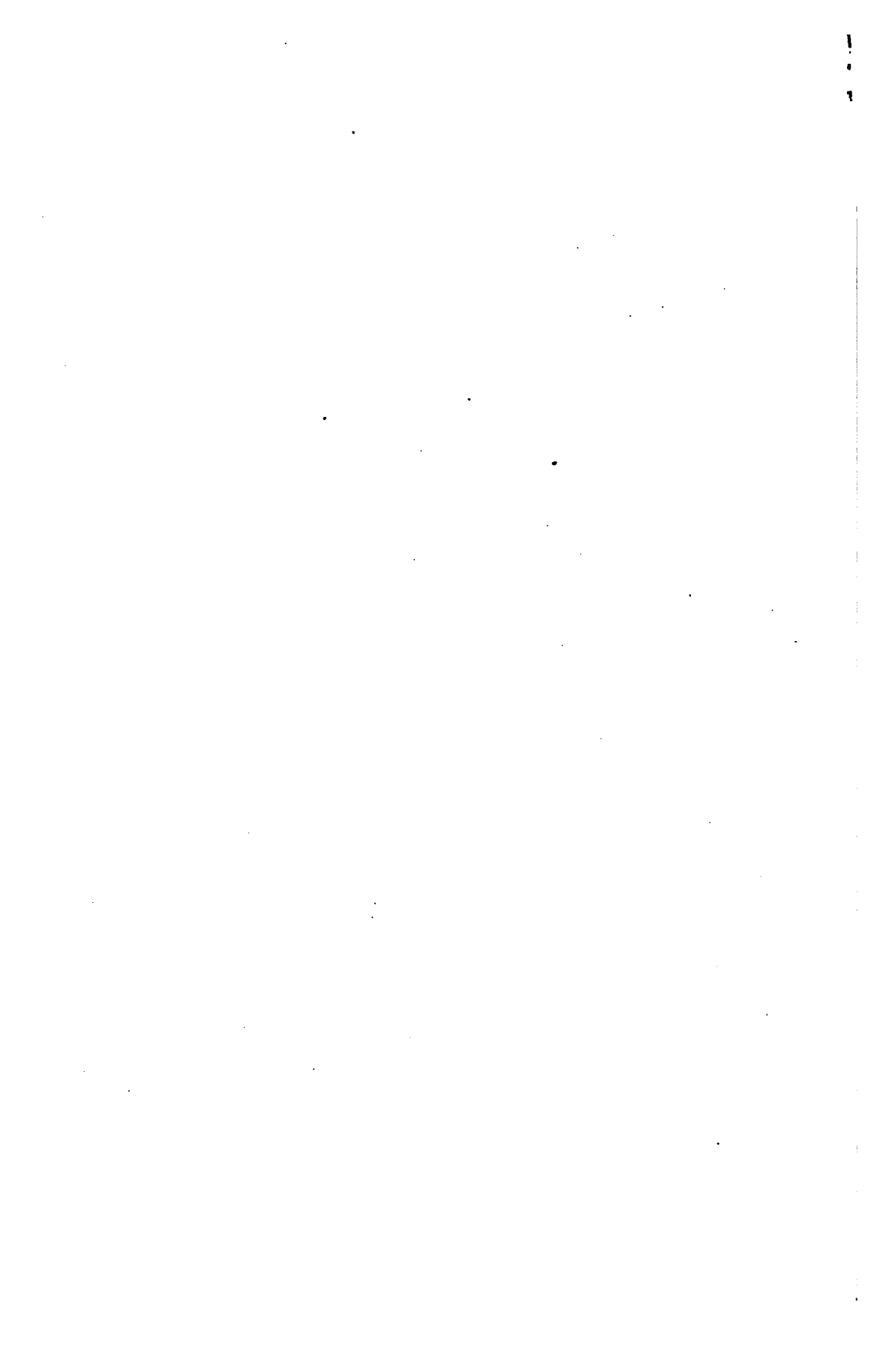
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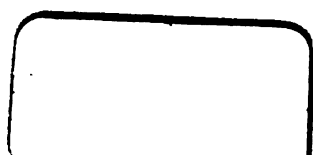






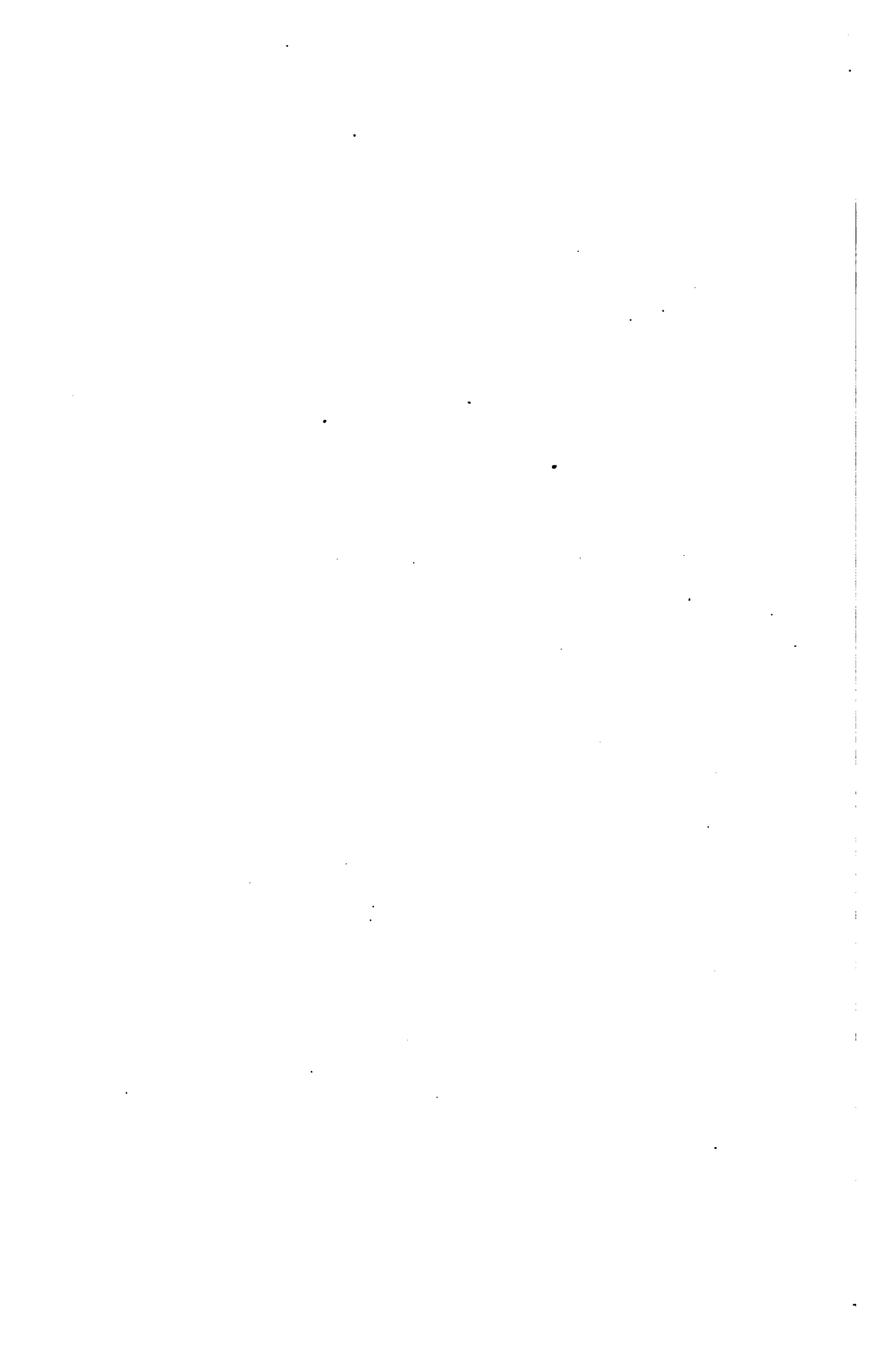


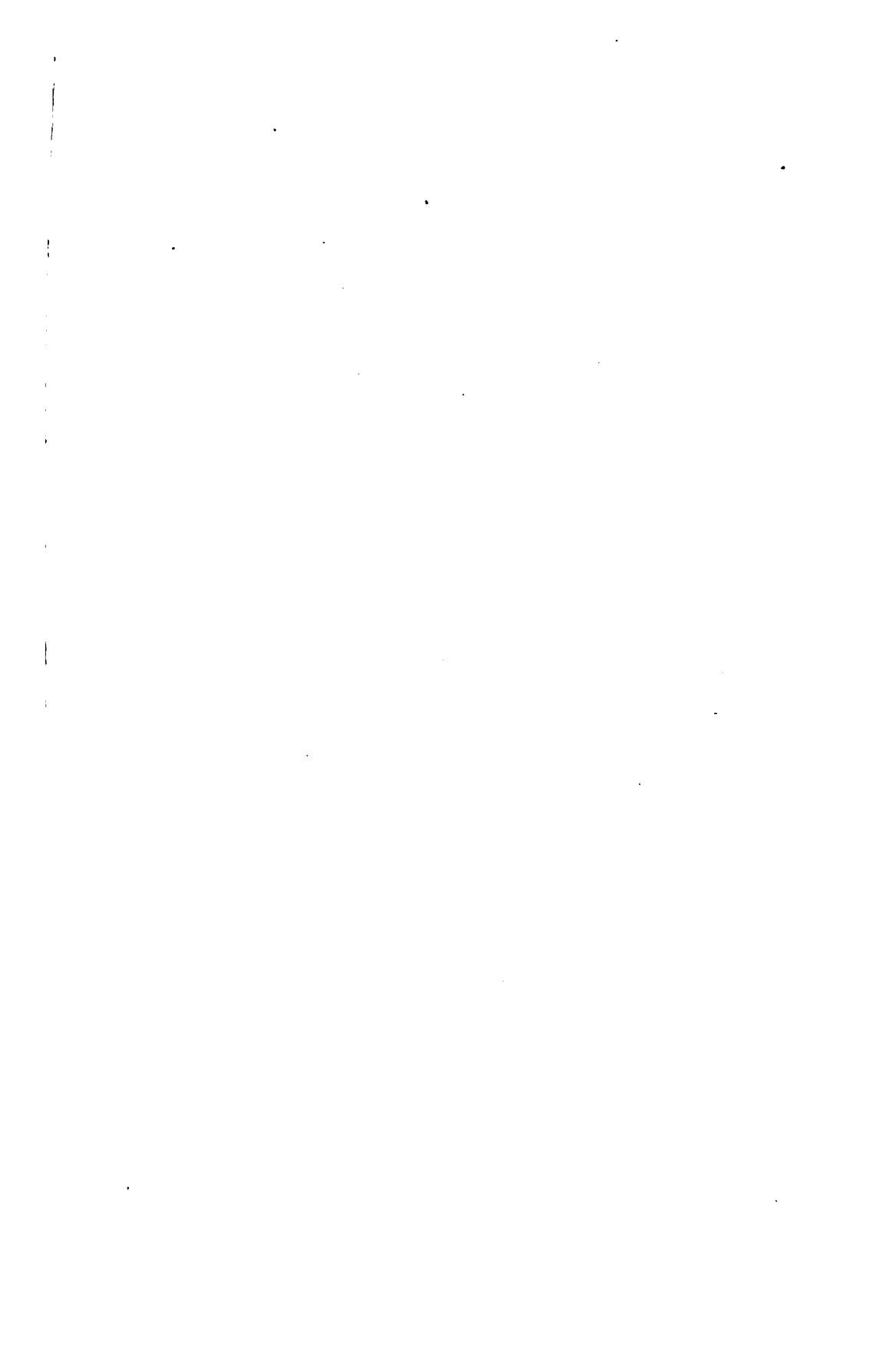






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# STUDIES IN AMERICAN JURISPRUDENCE

BY

THEODORE F. C. DEMAREST,  
A. M., LL.B., Columbia: Editor of *Surrogate Courts Reports*, in State of New York, 1883-1888. Author of  
"THE RISE AND GROWTH OF ELEVATED RAILROAD  
LAW;" "HINTS FOR FORENSIC PRACTICE," etc.

*"τὴν σκάφην δὲ σκάφην ὀνομάζων."*

ARISTOPHAN.

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1906

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## PREFATORY

If it shall be found, or considered, that in the ensuing lines the weightier matters of the law have, at times, been treated in lighter vein, no suggestion should thence arise, either of a lack of that unmeasured respect which must ever be rendered to those able jurists and lawgivers, under whose guiding hands the American *corpus juris civilis* is, surely though slowly, culminating, from myriad pediments, toward the pinnacle—the boast of a Coke, the dream of a Tribonian and a Bentham—of a systematized and completed, if not condensed, rationality; or of having omitted the aim to explore *ad antiquos rivos*, and ponder, with care, the *pros* and *contras* of each conclusion deduced.

Preferably, may the credit be awarded of having indulged a hope to supplement the writer's pleasurable diversion, in occasional investigation and reflection, with the boon of beguiling the donor of a leisure hour into paths, rugged indeed, and sometimes reproached with undue aridity, where tower venerable and majestic growths, the

fruitage of which, though hanging high, and of hardy pericarp, yields, to the breaker, kernels of intellectual nutrition, unrivalled by the fairer harvests whose burnished clusters glow and regale in the gardens of the imagination.

T. F. C. D.

NEW YORK, June, 1906.

## TABLE OF CONTENTS.

---

	Page
COPYRIGHT PAGE . . . . .	ii
PREFATORY . . . . .	iii
TABLE OF CONTENTS . . . . .	v
TABLE OF CASES, ETC. . . . .	vii
TABLE OF TREATISES, ETC. . . . .	xv
TABLE OF STATUTES, ETC. . . . .	xvii
I. THE OBLIGATION OF CONTRACT IN ITS RELATION TO THE UNITED STATES CONSTITUTION (June, 1905.)	1
II. THE OFFICE OF PRESIDENT OF THE UNITED STATES OF AMERICA (April, 1905.) . . . . .	57
III. ENUMERATED MOTIONS.—A CURIOSITY OF LEGAL LITERATURE (April, 1903.) . . . . .	89
IV. SUSPENSION OF THE POWER OF ALIENATION, UN- DER THE "REAL PROPERTY LAW" OF NEW YORK (February, 1905.) . . . . .	103
V. NONSUITS, OLD AND NEW (December, 1903.) . . . . .	122
VI. THE "DOMESTIC RELATIONS LAW" OF NEW YORK.	154
VII. THE EXIGENCIES OF EMINENT DOMAIN (April, 1903.) . . . . .	170
VIII. THE EXIGENCIES OF EMINENT DOMAIN [ <i>continued</i> ] (October, 1903.) . . . . .	192
IX. THE ABENDROTH CASE (June, 1892.) . . . . .	215
X. THE APPELLATE DIVISION OR DIVISIONS OF THE SUPREME COURT (July, 1895.) . . . . .	315
XI. A LIMITED LIMITATION . . . . .	324
XII. LEGAL NON-LOGIC . . . . .	342

	Page
APPENDIX I. Opinions of the United States Supreme Court, in the Case of <i>Muhlker v. R. R. Co.</i> . . . . .	1
APPENDIX II. Opinion of the Second Division of the New York Court of Appeals, in the Case of <i>Abendroth v. R. R. Co.</i> . . . . .	35

---

NOTE. Nos. I to VIII, and X, have appeared in the Albany Law Journal, through whose courtesy they are here presented. The dates given are the times of writing.

## TABLE OF CASES CITED

### IN THIS VOLUME.

	Page
<i>Abendroth v. Man. R. Co.</i> , 122 N. Y., 1.....	179
<i>Allen v. Ormond</i> , 8 East, 4.....	295
<i>Am. Bank Note Co. v. N. Y. El. R. R. Co.</i> , 129 N. Y., 271	49
<i>Att'y Gen'l v. Conservators of the Thames</i> , 1 H. & M., 1	282
<i>Att'y Gen'l v. Utica Ins. Co.</i> , 2 Johns Ch., 271.....	270
<i>Aylett v. Lowe</i> , 2 Blacks., 1221.....	137
<i>Bacon v. Texas</i> , 163 U. S., 207.....	30
<i>Bell v. Yates</i> , 33 Barb., 627.....	332
<i>Bellinger v. R. R. Co.</i> , 23 N. Y., 42.....	226
<i>Bihin v. Bihin</i> , 17 Abb. Pr., 19.....	328
<i>Bloodgood v. Mohawk, etc.</i> , R. R. Co., 18 Wend., 9..	171, 204
<i>Boggs v. Bard</i> , 2 Rawle, 102.....	329
<i>Bohm v. Met. El. R. Co.</i> , 129 N. Y., 576	
	21, 23, 50, 177, 179, 181, 189
<i>Borders v. Murphy</i> , 78 Ill., 81.....	328
<i>Budd v. Walker</i> , 3 Civ. Proc. R., 422.....	333
<i>Callanan v. Gilman</i> , 107 N. Y., 360.....	277
<i>Camp v. Smith</i> , 136 N. Y., 187.....	333
<i>Chandler v. Trayard</i> , 2 Cai., 94.....	95
<i>Chic., etc., R. R. Co. v. Chicago</i> , 166 U. S., 226.....	10, 12
<i>Clinton v. Eddy</i> , 54 Barb., 54.....	331
<i>Clinton v. Elmendorf</i> , 3 Johns., 143.....	95
<i>Cogswell v. R. R. Co.</i> , 103 N. Y., 10.....	227
<i>Colyer v. Guilfoyle</i> , 47 App. Div., 302.....	153

	Page
Corning v. Lowerre, 6 Johns. Ch., 439.....	269
Coster v. Lorillard, 14 Wend., 265.....	107, 108, 109
Cotton v. Maurer, 3 Hun, 552.....	328
Cox v. Parry, 1 T. R., 464.....	137
Crooke v. Anderson, 23 Hun, 266.....	272
 Davenport v. Short, 17 Minn., 24.....	 329
Davidson v. New Orleans, 96 U. S., 97.....	2, 9
Davis v. Hardy, 6 Barn. & Cresw., 225.....	139
Dewar v. Purday, 4 Nev. & Man., 633.....	126, 133
Dillon v. Cockroft, 90 N. Y., 649.....	151
Dodge v. Cornelius, 168 N. Y., 242.....	175
Dolan v. N. Y. & H. R. R. Co., 175 N. Y., 367.....	209
Dorr v. United States, 195 U. S., 140.....	61, 65, 82
Drake v. Hudson R. R. Co., 7 Barb., 508.....	187
 Eaton v. Boston, etc., R. R. Co., 51 N. H., 504.....	 245
Ellsworth v. Gooding, 8 How. Pr., 1.....	96
Elworthy v. Bird, 13 Price, 222.....	132
Empire Assoc'n v. Stevens, 8 Hun, 15.....	96
Eno v. Diefendorf, 1 Silv. [Ct. of App.], 157.....	333
Everitt v. Everitt, 29 N. Y., 71.....	112
 Fairchild v. Case, 24 Wend., 381.....	 329
Fanning v. Osborne, 34 Hun, 121.....	273
Fisher v. Pond, 1 Hill, 672.....	332
Fletcher v. Peck, 6 Cranch, 87.....	25
Fobes v. Rome, etc., R. R. Co., 121 N. Y., 505.....	310
Foden v. Sharp, 4 Johns., 183.....	95
Fox v. Star, etc., Co., 1 Q. B., 639.....	152
Francis v. Schoellkopf, 53 N. Y., 154.....	287, 293
Freeman v. Grant, 132 N. Y., 22.....	151
Fries v. N. Y. C. & H. R. R. Co., 169 N. Y., 270....	175
Fritz v. Hobson, 14 Ch. Div., 542.....	279, 280

# TABLE OF CASES CITED.

ix

	Page
Glover <i>v.</i> Manhattan R. Co., 51 N. Y. Sup'r, 1 . . . .	36, 37, 230
Grand Rapids Booming Co. <i>v.</i> Jarvis, 30 Mich., 308..	246
Harper <i>v.</i> Allyn, 3 Abb. [N. S.], 186 . . . . .	96
Harrison <i>v.</i> Wood, 2 Duer, 50 . . . . .	152
Hawley <i>v.</i> James, 16 Wend., 61 . . . . .	109, 111
Heath <i>v.</i> Page, 48 Penn. St., 130 . . . . .	329
Hitchcock <i>v.</i> Harrington, 6 Johns., 290 . . . . .	329
Hoey <i>v.</i> Met. St. R. Co., 70 App. Div., 60 . . . . .	149
Hood <i>v.</i> Smith, 5 N. Y. W. D., 117 . . . . .	285
Hough <i>v.</i> Stover, 2 Cai., 221 . . . . .	95
Hubbell <i>v.</i> Weldon, H. & D. Supp., 145 . . . . .	336
Hussner <i>v.</i> Brooklyn City R. R. Co., 114 N. Y., 433..	276
Jackson, <i>ex dem.</i> ——— <i>v.</i> ———, 2 Cai., 259 . . . .	96
Jackson <i>v.</i> Kinsey, 28 N. Y. State R., 394 . . . . .	340
Kane <i>v.</i> Bloodgood, 7 Johns. Ch., 90 . . . . .	327
Kane <i>v.</i> N. Y. El. R. R. Co., 125 N. Y., 164. .38, 176, 177, 239	
Kellinger <i>v.</i> Forty-second Street R. R. Co., 50 N. Y., 206 . . . . .	187, 196, 233
Knox <i>v.</i> Exchange Bank, 12 Wall., 379 . . . . .	2
Labar <i>v.</i> Koplin, 4 N. Y., 547 . . . . .	125, 139
Lahr <i>v.</i> Met. El. R. Co., 104 N. Y., 268 . . . . .	19, 30, 227
Lang <i>v.</i> Ropke, 5 Sandf., 363 . . . . .	105
Lansing <i>v.</i> Smith, 8 Cow., 151 . . . . .	287, 289
Lansing <i>v.</i> Smith, 4 Wend., 25 . . . . .	290
Lessee of Livingston <i>v.</i> Moore, 7 Pet., 546 . . . . .	66, 71
Lewis <i>v.</i> N. Y. & H. R. R. Co., 162 N. Y., 202 . . . . .	178, 206
Lindenthal <i>v.</i> Germ. L. Ins. Co., 174 N. Y., 76 . . . . .	150
Lomer <i>v.</i> Meeker, 25 N. Y., 361 . . . . .	147
Lorillard <i>v.</i> Coster, 5 Paige, 189 . . . . .	116
Louisiana <i>v.</i> Pilsbury, 105 U. S., 278 . . . . .	29
Lynch <i>v.</i> Met. El. R. Co., 129 N. Y., 274 . . . . .	216

	Page
McBeath v. Haldimand, 1 T. R., 172.....	136
McCabe v. McKay, 2 Cai., 100.....	95
McClure v. Central Trust Co., 165 N. Y., 108.....	148
McCulloch v. State of Maryland, 4 Wheat., 316.....	64, 69
McDonald v. Met. St. R. Co., 167 N. Y., 66.....	132
McKenzie v. Wilson, 2 Cai., 385.....	95
McQueen v. Babcock, 3 Keyes, 428.....	331
Mad. Ave. Ch. v. Oliver St. Ch., 73 N. Y., 95.....	216
Mahady v. Bushwick R. R. Co., 91 N. Y., 153....	253, 303
Marbury v. Madison, 1 Cranch, 173.....	67, 86
Matter of Gall, 182 N. Y., 270.....	327
Matter of Gilbert El. R. Co., 70 N. Y., 361.....	16
Matter of N. Y. El. R. R. Co., 70 N. Y., 354....	16, 173, 196
Matter of Rogers, 153 N. Y., 316.....	327
Matter of Townsend, 39 N. Y., 173.....	184, 193
Matter of Utica, etc., R. R. Co., 56 Barb., 464.....	195
Maynell v. Saltmarsh, 1 Keb., 847.....	279
Minchin v. Clement, 1 Barn. & Ald., 252.....	128
Miner v. Beekman, 50 N. Y., 343.....	340
Missouri Pac. R. v. Nebraska, 164 U. S., 403.....	10
Muhlker v. N. Y. & H. R. R. Co., 60 App. Div., 621; 173 N. Y., 549.....	3, 19, 21, 22, 174, 183
Muhlker v. N. Y. & H. R. R. Co., 197 U. S., 544.....	51
Munn v. Illinois, 94 U. S., 124.....	69, 73
Nehasane Park Assoc'n v. Lloyd, 167 N. Y., 431.....	341
Nevin v. Ladue, 3 Denio, 450.....	265
New York Nat. Exch. Bank v. Met. El. R. Co., 53 N. Y. Sup'r, 511.....	36
New York Nat. Exch. Bank v. Met. El. R. Co., 108 N. Y., 660.....	227
N. Pac. R. R. Co. v. Herbert, 116 U. S., 654.....	74
Ogden v. Saunders, 12 Wheat., 213.....	27, 28



TABLE OF CASES CITED.

xi

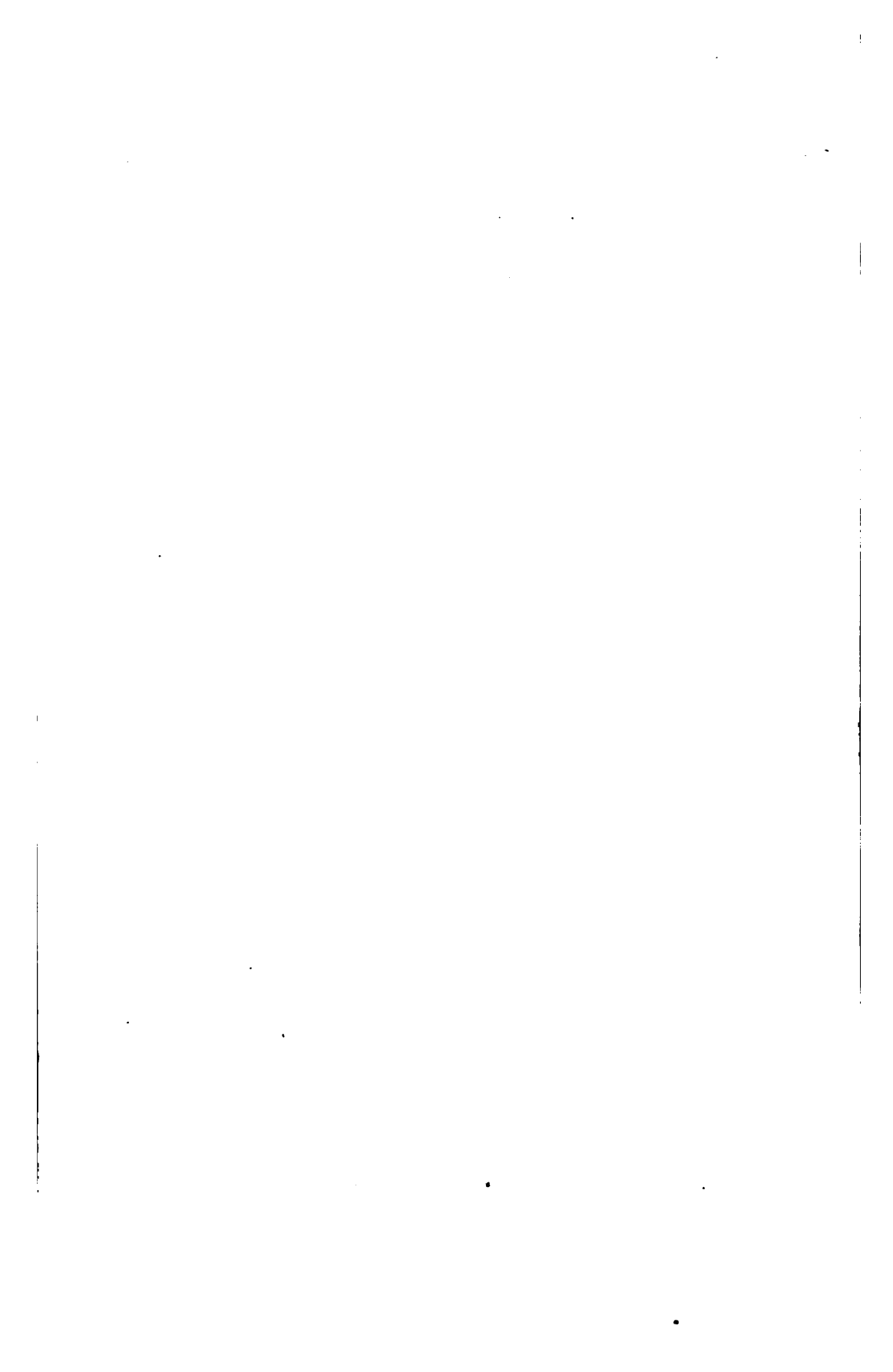
	Page
<i>Parker v. Ivin</i> , 47 Ga., 405.....	328
<i>Peck v. Cheney</i> , 4 Wisc., 249.....	329, 333
<i>Pegram v. Stoltz</i> , 67 N. Car., 144.....	329
<i>Peo., et al., v. Kerr</i> , 27 N. Y., 188.....	186, 196, 231, 250
<i>Peo., ex rel., v. Hayden</i> , 6 Hill, 361.....	171, 194, 204
<i>Peo., ex rel., v. Morton</i> , 156 N. Y., 144.....	72, 87
<i>Peo. v. N. R. R. Co.</i> , 42 N. Y., 233.....	96
<i>Peo. v. Tiphaine</i> , 13 How. Pr., 74.....	194
<i>Peo. v. Turner</i> , 117 N. Y., 227.....	339
<i>Peo. v. Turner</i> , 145 N. Y., 451.....	339
<i>Piatt v. Vattier</i> , 9 Pet., 415.....	326
<i>Pierce v. Dart</i> , 7 Cow., 609.....	285
<i>Piper v. Hoard</i> , 107 N. Y., 67.....	331
<i>Pond v. Met. El. R. Co.</i> , 112 N. Y., 188.....	253, 304
<i>Powers v. Man. R. Co.</i> , 120 N. Y., 178.....	253, 305
<i>Pratt v. Hall</i> , 13 Johns., 334.....	125
<i>Prigg v. Commonwealth of Penn'a</i> , 16 Pet., 610.....	72
<i>Putnam v. Wyley</i> , 8 Johns., 432.....	98
<i>Radcliff v. Mayor of Brooklyn</i> , 4 N. Y., 195 15, 18, 185, 190, 195, 226	
<i>Railroad Co. v. Rock</i> , 4 Wall., 177.....	2
<i>Reinig v. N. Y., L. &amp; W. R. R. Co.</i> , 128 N. Y., 157....	176
<i>Remsen v. Isaacs</i> , 1 Cai., 22.....	95
<i>Ricket v. Directors of Met. R. Co.</i> , 2 H. L., App. Cas., 175.....	284
<i>Rivers v. Washington</i> , 34 Tex., 267.....	329
<i>Robbins v. Harvey</i> , 5 Conn., 335.....	328
<i>Robert Mary's Case</i> , 9 Coke, 113.....	295
<i>Roberts v. N. Y. El. R. R. Co.</i> , 128 N. Y., 455.....	199
<i>Robinson v. Allen</i> , 37 Iowa, 27.....	328
<i>Rose v. Groves</i> , 5 Man. & G., 613.....	282
<i>Sadler v. Robins</i> , 1 Campb., 253.....	137

	Page
<i>Sage v. City of Brooklyn</i> , 89 N. Y., 195.....	172, 194, 204
<i>Sands v. St. John</i> , 36 Barb., 628.....	328
<i>Scanlan v. Wright</i> , 13 Pick., 523.....	74
<i>Schoener v. Lissauer</i> , 107 N. Y., 117.....	340
<i>Scott v. McNeal</i> , 154 U. S., 34.....	3
<i>Sears v. Shafer</i> , 6 N. Y., 268.....	329
<i>Shattuck v. Bascom</i> , 105 N. Y., 39.....	337
<i>Shepard v. Man. R. Co.</i> , 43 N. Y. S. R., 117.....	250
<i>Smith v. Cheetham</i> , 2 Cai., 81.....	95
<i>Smith v. Edwards</i> , 88 N. Y., 102.....	112
<i>Somers v. Met. El. R. Co.</i> , 129 N. Y., 252.....	240
<i>Steinway v. Steinway</i> , 163 N. Y., 194.....	113, 121
<i>Stetson v. Faxon</i> , 19 Pick., 147.....	278
<i>Stevens v. N. Y. El. R. R. Co.</i> , 130 N. Y., 95.....	51
<i>Story v. N. Y. El. R. R. Co.</i> , 90 N. Y., 122 18, 30, 37, 176, 179, 188, 190, 192, 198, 227	
<i>Stuber v. McEntee</i> , 142 N. Y., 200.....	147
<i>Sturges v. Crowninshield</i> , 4 Wheat., 122.....	27
 <i>Tarbox v. Supervisors</i> , 34 Wisc., 588.....	 329
<i>Taylor v. Met. El. R. Co.</i> , 50 N. Y. Sup'r, 311.....	284
<i>Tazewell v. Whittle</i> , 13 Gratt., 329.....	327, 328
<i>Troy &amp; Boston R. R. Co. v. Lee</i> , 13 Barb., 171.....	195
<i>Turner v. New York</i> , 168 U. S., 94.....	339
 <i>Van Brunt v. Ahearn</i> , 13 Hun, 388.....	 271
<i>Vann v. Rouse</i> , 94 N. Y., 407.....	340
<i>Van Schaick v. Winne</i> , 8 How. Pr., 8.....	96
 <i>Waddell v. United States</i> , 25 Ct. of Claims, 328.....	 327
<i>Walters v. Syracuse R. T. R. Co.</i> , 178 N. Y., 50.....	150
<i>Ward v. Mason</i> , 9 Price, 291.....	129
<i>Watkins v. Towers</i> , 2 T. R., 275.....	126

**TABLE OF CASES CITED.**

**xiii**

	<b>Page</b>
<b>Wells v. Watling, 2 Black, 1233.....</b>	<b>295</b>
<b>Wilbur v. Wilbur, 165 N. Y., 451.....</b>	<b>120</b>
<b>Williams v. N. Y. C. &amp; H. R. R. Co., 16 N. Y., 97....</b>	<b>251</b>
<b>Wisecarver v. Kincaid, 83 Penn. St., 100.....</b>	<b>326</b>
<b>Zink v. McManus, 121 N. Y., 265.....</b>	<b>339</b>



## TABLE OF TREATISES CITED

### IN THIS VOLUME.

	Page
Abbot, Law Dictionary.....	99
Angell, Highways.....	332
Angell, Limitations.....	332
Austin, Jurisprudence, Lecture 47.....	246, 259
Baylies', Trial Practice.....	147
Blacks. Comm., I, 349.....	75
"    "    II, ch. 7.....	255
"    "    III, 57.....	325
"    "    "    295.....	122, 123
"    "    "    376.....	124
Bouvier, Law Dictionary.....	68, 74, 326
Bryce, American Commonwealth.....	62, 65, 83, 87
"    Stud. History and Jurisprudence.....	57, 60, 62, 63
Caines, Practice.....	93, 140
Chaplin, Express Trusts and Powers.....	115
Chitty, General Practice.....	126, 136
"    Pleading.....	332
Coke, Institutes.....	300
"    Littleton.....	124
Curtis, Constitutional History of United States.....	64
De Tocqueville, Democracy in America.....	82
Digby, History of Law of Real Property.....	199
Dunlap, Practice.....	93, 97, 98, 99
Equity Draftsman.....	332
Federalist.....	76, 77
Fowler, Annotation of "Real Property Law".....	115

	Page
Gilbert, <i>Forum Romanum</i> .....	123
Graham, Practice.....	126
Mills, Eminent Domain.....	246
Mitford, Chancery Pleading.....	331
Mulford, Nation.....	58, 59
Raleigh, Property.....	254
Sedgwick, Interpretation of Statutes .....	246
Stephen, Pleading.....	122, 332
Story, Constitution.....	87
Thompson's Entries ( <i>Liber Placitandi</i> ).....	140, 332
Venable, Partition of Powers (1885).....	61
Whately, Logic.....	252
Wheaton, International Law.....	57
Wood, Limitation of Actions.....	330
Wood, Nuisances.....	330

## TABLE OF STATUTES CITED

### IN THIS VOLUME.

	Page
U. S. Const., art. 1, § 10.....	2, 55
“ “ “ 2, § 1.....	67
“ “ “ 2, § 3.....	83
“ “ “ 3, § 1.....	67
“ “ XIV Amendment.....	2, 24, 25
14 Geo. II, c. 17.....	152
21 Jacq. I, c. 16.....	328
Magna Charta Regis Johannis.....	324
3 & 4 William IV, c. 27.....	328
N. Y. Const., art. 1, § 6.....	193, 206, 221, 235
“ “ “ 6.....	315
N. H. Const. (1792), art. 12.....	247
N. Y. R. S. (1830), Pt. 2, ch. I, tit. 2, § 14.....	103
Revisers' Notes (1830).....	107
Code Civ. Proc., §§ 405, etc. ....	142-144
“ “ “ §§ 380, 388.....	330
“ “ “ § 822.....	152
“ “ “ § 1186.....	97
“ “ “ §§ 1233, 1234.....	99
N. Y. Gen. Rule Prac., 36.....	152
“ “ “ “ 38.....	93
“ “ “ “ 40.....	99, 101
N. Y. Laws, 1850, ch. 140.....	196, 201
“ “ 1855, ch. 427, § 65.....	336
“ “ 1866, ch. 697.....	172, 196
“ “ 1867, ch. 489.....	172, 196

	Page
N. Y. Laws, 1875, ch. 606.....	196, 202
“ “ 1885, ch. 448 .....	337
“ “ 1888, ch. 100 .....	158
“ “ 1892, ch. 339.....	42, 204
“ “ 1895, ch. 946 .....	319
“ “ 1896, ch. 272 .....	157
“ “ 1896, ch. 547 .....	104
“ “ 1897, ch. 417 .....	113



# STUDIES IN AMERICAN JURISPRUDENCE

## I.

### THE OBLIGATION OF CONTRACT, IN ITS RELATION TO THE UNITED STATES CONSTITUTION.

It is a majestic spectacle, when a State of the Union bows to the supremacy of a power created by its own surrender of a portion of its sovereignty. When the Supreme Court of the United States exercises its supervisory power over the subordinate federal tribunals, an interest is felt, dependent, for its degree, on the nature and importance of the question at issue. But a reversal, by it, of a judgment rendered by a court of final jurisdiction of a State, attracts special attention, not only by reason of the suggestiveness of the reflection,—that radically divergent views may be entertained by two exalted judicial bodies,—but also because of the comparative rarity of such an occurrence.

The People of the States have embodied, in the federal compact, two restrictions upon the power of the States, which are of present pertinency, and which, when the judiciary of a State has finally

*held*, in a given case, that those restrictions have been duly observed by its governmental authorities, furnish the ground for an appeal, by a party opposing such view, to the Supreme Court of the United States.

The clauses of the United States Constitution, to which reference is had, are:

"No State shall . . . pass any . . . law impairing the obligation of contracts."<sup>1</sup>

"No State shall . . . deprive any person of . . . property without due process of law."<sup>2</sup>

Each of these two prohibitory provisions of the federal Constitution is, manifestly, on its face, a limitation on the exercise of governmental powers, and has no relation to unofficial, individual conduct. And so it has been *held*.

Of the contract-obligation-impairment clause, it has been said: "It must be the Constitution, or statute, of the State, which impairs the obligation of a contract, or the case does not come within our jurisdiction."<sup>3</sup> In other words, this clause of the United States Constitution is a restriction exclusively imposed on State *legislation*, whether organic or ordinary.

Of the Fourteenth Amendment, containing the due-process-of-law clause, it has been said: "The article is a restraint on the legislative, as well as on the executive and judicial power of the" (State) "government."<sup>4</sup> "These prohibitions extend to

<sup>1</sup> U. S. Const. art. I, § 10.

Wall. 379, 383; *Railroad Co. v.*

<sup>2</sup> *Id.* XIV Amendment, 1868.

Rock, 4 Wall. 177, 181.

<sup>3</sup> *Knox v. Exchange Bank*, 12

<sup>4</sup> *Davidson v. New Orleans*, 96 U. S. 97, 107.

all acts of the State, whether through its legislative, its executive or its judicial authorities." <sup>1</sup>

On April 10, 1905, the highest federal court reversed the decision of the highest court of the State of New York, in an action brought by Henry Muhler against the N. Y. & Harlem R. R. Co. and the N. Y. Central & Hudson River R. R. Co.<sup>2</sup> The ultimate State decision dismissed the complaint on the merits, thereby reversing a judgment of the State Supreme Court, which had affirmed the judgment rendered, in plaintiff's favor, on the trial.

Plaintiff, by two deeds, dated respectively in 1887 and 1888, had become the owner of two parcels, together constituting a lot of land, situated on the northwest corner of Park avenue and One Hundred and Fifteenth street, New York city, upon which, in 1891, he had erected a five-story brick building. The action was brought, in equity, January 7, 1897. The complaint set forth: that plaintiff was owner of the lot; that said avenue was a public street, and that plaintiff, as appurtenant to his premises, had certain rights and easements in the avenue; that, for more than six years previously, defendants had maintained, on that portion of Park avenue which was subject to his easements, a railway, in a depression, with solid walls of masonry extending many feet above the surface of the avenue, and operated the same by trains drawn by steam engines; that, in April, 1893, defendants began to construct, and had in part erected and since main-

<sup>1</sup> *Scott v. McNeal*, 154 U. S. 34, 45.      <sup>2</sup> 60 App. Div. (N. Y.) 621; 173 N. Y. 549.

tained, on the portion of said avenue mentioned, a permanent elevated railway structure of iron and steel, supported by columns standing on pedestals embedded in the soil of the avenue, which was a special, additional and continuing injury to plaintiff; that his premises had thereby been deprived of light, air, access, ventilation, stability, quiet and other rights, and the easements appurtenant to his premises had been and were appropriated by defendants, depreciating the value of the premises and their use in the sum of \$150,000; that defendants intended to add to said structure, and, on completion, to run thereon trains drawn by steam engines, whereby those easements would be further appropriated, and additional damage inflicted; that the injuries would be constant and continuous trespass, and, to prevent a multiplicity of suits, equitable interference was necessary; and that said acts of defendants were and would be without warrant of law, without plaintiff's consent, and without compensation to him.

Accordingly, the complaint asked judgment: "That the defendants may be enjoined from using said elevated structure and said depression, and from continuing both or either opposite the said premises, and from doing any acts with respect to said elevated structure except to remove the same; or that the court shall determine the amount of damages to the fee value of said premises in consequence of the appropriation of plaintiff's said easements, as aforesaid, amounting, as plaintiff alleges, to \$100,000 and over, and that, unless the defend-

ants shall forthwith pay the same to the plaintiff, the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite the said premises." As further relief, the complaint asked to recover damages for injury sustained, from 1890 to the time of trial, by reason of defendants' said wrongful acts, which damages were put at \$50,000.

From this abstract of the contents of the complaint, it will be seen that the plaintiff did *not* sue solely to enjoin the use of the railroad structure, unless on payment of the fee-value of certain easements; for the allegation was, that defendants' acts were wholly without warrant of law, and plaintiff prayed for an absolute injunction, restraining defendants from using the depression, and the viaduct, and from doing any act with respect to the latter, except to remove it; then, as an alternative, probably realizing that it would be impracticable to stop the progress of this public improvement, and having in mind the history of the litigations against the elevated-street-railroad companies, who could not be said to have proceeded wholly without warrant of law, and the abutters on whose routes had established a precedent of securing a judgment of injunction *nisi*, plaintiff imitated the prayers of their complaints, indicating his willingness to submit to the trespass, on condition of receiving \$150,000.

In the trial court, plaintiff recovered a judgment like one of the elevated-street-railroad, equitable judgments, viz.: for an injunction against the continuance of the viaduct, with an alternative con-

sisting of a refusal of the injunction on condition that defendants pay to him \$3,000, as the net value of his easements in the avenue, which defendants appropriated by means of the viaduct; and for "past damages" in the sum of \$1,400, for the user since February, 1897. Under the State equitable practice, such an adjustment involved, as one of its features, a deed from plaintiff to defendants of so much of plaintiff's easements of light, air and access in the street, as were taken or destroyed by the viaduct and its use. Plaintiff's opposition to the depression and its use was not pressed.

This judgment it was, which was affirmed on defendants' primary appeal to the State Supreme Court, whose determination was subsequently reversed by the Court of Appeals. The practical result of the federal decision was, it is supposed, to reinstate and affirm plaintiff's original recovery.

The United States court was, as nearly as possible, evenly divided on the appeal to it, three of the justices concurring in the prevailing, and three in a dissenting, Opinion, the ninth justice concurring in the result only, of the former.

The doubt, which sometimes arises on the determination of an important litigation by a court of high authority, the practical bearings of which may be obvious, as to what was the *ratio decidendi*, ought to be absent in this case, because of the fact that what may be termed the prevailing Opinion in the federal court explicitly announces the ground of its decision, thus:

"When plaintiff acquired his title, those cases"

(the Story and Lahr elevated-street-railroad decisions) "were the law of New York, and assured to him that his easements of light and air" (access not mentioned) "were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation. And this is the ground of our decision" ; it being added, that "the power of the courts of New York to declare rules of property or change or modify their decisions cannot be exercised to take away rights which have been acquired by contract, and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism, and when there is a diversity of State decisions the first in time may constitute the obligation of such contract and the measure of rights under it."

Plaintiff recognized that his opportunity of seeking a review, by the federal Supreme Court, of the decision against him in the State court, was afforded only by one or both of the clauses of the United States Constitution, which have been quoted; as is observed in the prevailing federal Opinion, where it is said: "The rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract-clause of the Constitution of the United States and the fourteenth amendment. The latter is invoked because the Act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city."

An attempt will now be made to discover what part was played by these two restrictions, imposed by the federal Constitution on the powers of the States, in guiding four justices of the United States Supreme Court to the conclusion or conclusions declared or indicated in the prevailing Opinion. If the part so played were quite obvious, this proposal would be supererogatory, and it must, therefore, be confessed that the logic of the prevailing Opinion has proved, at times, in the course of a painstaking examination, to be elusive.

Was the State court's decision reversed because the State had infringed the contract-obligation-impairment clause of the United States Constitution, or because it had deprived plaintiff of property without due process of law, or on both grounds? If on both those grounds, were there two distinct instances of State action, one of which violated the former, and the other the latter of these two constitutional inhibitions, or was there but one act on the part of the State which was held to contravene both clauses? If the contractual element was present, what was the substance of the contract, and when and between what parties was it made? If the obligation of a contract was found to have been impaired, this effect must, as has been seen, have been accomplished by the Constitution or a statute of the State. But, if there was an *independent* deprivation of property without due process of law, was this done by legislative, executive or judicial action?

Such is the general tenor of inquiries which now



present themselves, and answers to which are to be sought by an examination of the prevailing Opinion.

It may be remarked, by way of prelude, that the fourteenth amendment of the United States Constitution (due-process-of-law clause) is not mentioned in that Opinion, except where the fact is noted, that the plaintiff in error invoked it; while there is a distinct declaration that "the permission or command of the State can give no power to invade private rights, even for a public purpose, without payment of compensation." Now, inasmuch as the *federal* Constitution contains no explicit restriction on the power of a State to take private property for public use (eminent domain), attention will, in the first place, be directed to the question whether a taking, by a State, of private property for public use without provision for any compensation would be, within the federal decisions, an infringement, on the part of the State, of the due-process-of-law clause of the fourteenth amendment to the United States Constitution.

If it shall appear, from the United States authorities, that this question is to be answered in the affirmative, it will be possible, and, doubtless, proper to consider any references, in the prevailing Opinion, to State exercise of eminent domain without compensation, as implied references to the due-process-of-law clause of that amendment.

In *Davidson v. New Orleans*,<sup>1</sup> Mr. Justice MILLER remarked: "If private property be taken for public

<sup>1</sup> 96 U. S. 97.

uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition, in the fifth amendment" (restrictive of the Congress only), "with the one we are construing" (due-process-of-law), "was left out, and this was taken. It may possibly violate some of the principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States";<sup>1</sup> but Mr. Justice BRADLEY said: "If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, etc.), I think it would be depriving a man of his property without due process of law."<sup>2</sup>

Where the *use* for which the property is taken is *private*, there is a direct ruling, the question of compensation being immaterial. "The taking, by a State, of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth amendment of the Constitution of the United States."<sup>3</sup>

In *Chicago, etc., R. R. Co. v. Chicago*,<sup>4</sup> the facts were: that the State Constitution contained the usual compensation-requirement, in respect of the legislative exercise of the power of eminent domain; that, by authority of a statute containing provi-

<sup>1</sup> Id. p. 105.

<sup>2</sup> Id. p. 107.

<sup>3</sup> *Mo. Pac. R. v. Nebraska*, 164 U. S. 403, 417.

<sup>4</sup> 166 U. S. 226.

sions for duly fixing the amount of just compensation for private property to be taken, and by means of regular proceedings had thereunder, the city of Chicago condemned a transverse strip of the right of way of a railroad company, the plaintiff in error, for a crossing of a public street, for which a jury, duly impaneled, awarded to the railroad company one dollar as the just compensation. This award having been confirmed by a judgment, which was affirmed by the highest court of the State of Illinois, a writ of error in behalf of the railroad company was issued, to the Supreme Court of the State, out of the United States Supreme Court; in the latter of which courts, the plaintiff in error contended that an award of compensation, to the extent of one dollar only, deprived it of its property without due process of law, and so violated the fourteenth amendment of the United States Constitution. It should be particularly noticed that the State statute, in the case cited, made due provision for just compensation to the owners of private property, taken for the public use to be subserved, as required by the State Constitution, and that the proceedings which were had thereunder were in all respects regular, and in compliance with the statute. The federal court, in its majority Opinion, reviewed the circumstances affecting the question of the sufficiency of the compensation awarded, *held* that the verdict of the jury who sat as appraisers must control, and that the award must be deemed adequate, and so affirmed the State judgment. The highway crossing

did not interrupt the running of the trains. But the amount of the award was so nearly nothing, that the federal court was led, in its Opinion, to consider and discuss the constitutional bearings of State legislation, involving the taking of private property, but containing no provision for compensation, saying:

"It is proper to inquire whether the due process of law requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State. . . . In our opinion *a judgment of a State court*, even if it be authorized by statute, whereby private property is taken for the State, or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument." <sup>1</sup> Mr. Justice BREWER dissented even from the affirmance of the State judgment, saying: "After a declaration by this court that a State may not, through any of its departments, take private property for public use without just compensation, I cannot assent to judgments which, in effect, permit that to be done." <sup>2</sup>

The case last cited is interesting in the present study of the principal case as intimating that a judgment, in all respects regular and valid under

<sup>1</sup> 166 U. S. 235, 241.

<sup>2</sup> Id. p. 263.

the State Constitution and laws, rendered by the highest State court, may be, of itself and solely, the act whereby a State violates the due-process-of-law clause of the United States Constitution—the particular act there contemplated being a judgment rendered in the course of the exercise of eminent domain. The reason why such interest attaches is, that it will be desirable to determine what relation the doctrine of the case last cited bears to that declared in the part of the prevailing Opinion, in the present case, where it is said that the power of the courts of New York to declare rules of property, or change or modify their decisions, cannot be exercised to take away rights which have been acquired by contract—a point which will be referred to hereafter. It may be here incidentally suggested, that it is unimportant whether or not the people of a State have, by their own Constitution, forbidden their legislature to pass a law for the taking of private property without providing for just compensation, seeing that the State will inevitably run counter to the federal Constitution, if it take such property from an owner, making no compensation—an instructive illustration of the salutary force of the federal tie, as constituted by the People of the States.

It is submitted, that the result of the foregoing definite inquiry—whether the taking of private property by a State, without making compensation, is, within the federal decisions, a species of deprivation of property without due process of law—is a validation of an affirmative answer to the question.

In view of such result, the following query is now submitted: Might the Opinion, in the case in hand, have been written within the compass of a few lines, substantially thus:

(The State of New York, in 1892, through its legislature, provided for a public improvement by a statute which concededly involved the *taking* of property of the plaintiff in error, consisting of certain easements in a public street whereon his lot abutted, and which statute contained no provision for compensation to him. Such statute was, within the adjudications of this court, a denial of due process of law and void. The defendants, therefore, acting wholly without lawful authority, in the maintenance of the viaduct in Park avenue and running their trains thereon, were trespassers, and plaintiff was entitled to judgment against them. No reason appearing for an interference by this court, with the nature or amount of the relief awarded to plaintiff on the trial of his action, the judgment under review must be reversed, and plaintiff's original recovery affirmed.)

So far as at present apprehended, there is only one—but still one—reason why the above-submitted, imaginary Opinion would not have been available, and it centres in “taking,”—the word emphasized therein. This reason is believed to be not immediately obvious, nor capable of being set forth in a word. An effort will be made to submit an explanation in as few words as possible. The task involves a recalling of some juridical history.

It has long been the law of the State of New York, that the State has a right to *damage* a man's property (of course, for public purposes) without paying him any damages,<sup>1</sup> although the State Constitution, by its eminent-domain clause, necessitates compensation where the State *takes* private property, *in invitum*.

When the Story case, in which the judges stood four to three on the final decision, came before the highest State court in 1882, the general situation, with which the court was confronted, was, that the State had provided for or permitted the construction of an elevated railroad structure above, and along the lines of, certain public streets in a city, the owner of a lot abutting on one of which streets wanted something at least analogous to the eminent-domain treatment (payment of compensation for alleged injury to his lot), while the railroad company, whose acts were performed under statutory authority, and whom he had sued for an injunction, insisted on his receiving the Radcliff treatment (*damnum absque injuria*).

The particular *data* with which the State court had to deal, in the Story case, were as follows:

The statutes, under which the railroad company was proceeding, made due, general provision for the ascertainment and payment of just compensation for any private, real property which the company might require and *take* in its realizations, and so were constitutional, as far as the eminent-domain clause of the organic law of the State was concerned

<sup>1</sup> Radcliff v. Mayor of Brooklyn, 4 N. Y. 195 (1850).

—this question having been regularly litigated, and the affirmative *held*, in 1877,<sup>1</sup> but the company had not paid Story any compensation, and did not propose to. Why not? Because (as contended) it was not taking his *lot*, or any part of it; quite on the contrary, it was lawfully constructing a railroad above and along a public street, which belonged to the city, and the city had consented. But the property owner replied that he had private property in the public street. What was it, and how did he get it? After he had answered that question, the company would challenge him to show that it was going to *take* private property. Thus the battle closed around the positions implied in these queries and in this challenge. And the tide ultimately turned in Story's favor on both points.

1. As to the existence and origin of Story's "property" in the public street. His private (real) property in the street was *held* to consist of three easements, namely, of light, air and access, which "incorporeal hereditaments" were held to be appurtenant to his lot. He was *held* to have acquired this property in the manner described as follows: Anciently, the land which included what was afterwards his lot and the street (Front) in front of the same, was riparian and under water, and belonged to the city of New York as proprietor. The city conveyed this land to two men, by a deed in which the grantees covenanted to construct the said street, and in which deed the city (as it is believed to have been *held*) covenanted that such street

<sup>1</sup> 70 N. Y. 327; *id.* 361.



should continue for free and common passage as a public street forever. Story got his lot, through mesne conveyances, from these private owners, grantees of the city, and so, ultimately, from the city. On familiar principles, probably, Story could claim the benefit of that covenant which ran with the land. But how was this last proposition relevant, seeing that he, at present, was not suing the city, nor the agent of the city, and the city still owns the street? The true answer to this last question is believed to be, that the judicial reasoning in the Story case reverted, indeed, to this old covenant, but did not travel down from it, along the line of a remedy on the covenant—*i. e.*, damages for a breach, or an injunction against a breach—but stopped right at the covenant, and *held* that the latter *created* (private, real) property, belonging to the abutter, in the street, to wit, three, and only three, incorporeal hereditaments (easements) in the street, appurtenant to his lot. Thus the first redoubt was carried. Private (real) property, in a public place, was *held* to have been (or was now?) created; at any rate, it was now first adjudged to exist.

2. As to the *taking* of Story's property. So far, well. The battle, however, was not won. There was another position to be met. Through the railroad company, as its agent, the State was only going (it was suggested) to *damage* this property. "If anyone will take the trouble to reflect, he will find it a very common case, that the property of individuals suffers an indirect injury from the con-

structing of public works; ”<sup>1</sup> it is mere *damnum*, loss—not a legal injury. To abandon the metaphor, Story won. His (real) property, in the street, was (1) declared to have been created, and (2) *held to be taken*; which latter ruling implied, as its indispensable basis, the proposition, that permitting an elevated railroad in a street is a failure to cause it forever to continue for free and common passage as a public street—in other words, is inconsistent with the purposes of a public city street, to which it had been devoted, as per the covenant aforesaid; and the railroad company paid for it.

The observation, understood to refer to the said adjudications, by the State court, of a creation, and a taking, of private (real) property in a public street, that “it is, of course, impossible to reproduce the argument of the court, by which its conclusions were sustained,” is probably to be explained by the circumstance that there was little argument indulged, by the State court, either as to the creation, or the taking, of Story’s (private, real) street property. “The right thus secured” (to have the street continued) “was an incorporeal hereditament” ;<sup>2</sup> “in doing this thing” (constructing, maintaining and operating an elevated, street railroad), “the defendant will take his property.”<sup>3</sup> Proceeding on the basis of inherent justice, and not purporting to be supported by precedent, this was a judicial edict—doubtless, beneficent; it was equity—which has been defined as *arbitrium boni*

<sup>1</sup> Radcliff case, *ubi supra*.

<sup>2</sup> *Id.* p. 146.

<sup>3</sup> 90 N. Y. 145.

*vir*i. Now, *arbitrium* is, *ex vi termini*, arbitrary, of course, in a good sense. Should the same question arise again, in another, not identical, but similar case, ought there not to be power to arbitrate the other way? For, as will be seen, the crucial question was a question of the estimated *amount of damage* done to the abutter; and the authority of precedent could not be controlling, not only because this was the first elevated, city, street-railroad, but also because no standard of amount of detriment, beyond which the State would not, or could not, go, in making or allowing public improvements, without compensation, existed. The highest State court, as constituted when the Story case was decided, was almost evenly divided, in deciding that action; the facts, in Muhlker's case, were not identical with those in that of Story,—for instance, the railroad company, as it is understood, had a right, as against Muhlker, to maintain and operate its road in the depression in the street; and, in his case, the State court leaned in favor of the Radcliff rule. "Whatever detriment the improvement may be to the abutter, in such cases, is held to be *damnum absque injuria*." <sup>1</sup> It is a general principle that a fair exercise of judicial discretion is not to be impugned.

The relation of the Lahr case <sup>2</sup> to that of Story should be noted. When Story brought his action, in or before 1882, the railroad company was constructing, and proposing to complete, its viaduct over the street. When Lahr sued, in 1887, every-

<sup>1</sup> Muhlker case, 173 N. Y. 555.

<sup>2</sup> 104 N. Y. 238.

thing was finished, except the running of the trains; which latter process, though intermittent, was prospectively perpetual. But the former decision was *held* to be, in all substantial particulars, a valid and controlling precedent for the decision of the later case. The following synopses exhibit the mutual relations of the two cases.

In the Story decision, the logical steps were:

(1) A covenant, of the city, that the street should continue for the free and common passage, as a public street, contained in a deed from the city, owner of the street, given to Story's predecessor in title.

(2) Which covenant was *held* to create (real) property—three easements in the street.

(3) An adjudication that there was a *taking* of this (real) property for a public use.

(4) Enforced compensation (under constitutional statutes, duly authorizing the taking).

In the Lahr decision, the logical steps were:

(1) A covenant of the State—trust-owner of the street—implied in a statute, *plus* proceedings thereunder, to the effect that the street be appropriated and "kept open," as such, enuring to the benefit of persons "liable to be assessed for its benefits," including abutters.

(2) Which covenant, per Story precedent, created (real) property—three easements in the street.

(3) Story precedent followed, as to a *taking* of this real property.

(4) Enforced compensation (under like statutes).

While a *covenant* is undoubtedly a *contract*, it

should be noted that, in neither the Story nor the Lahr case, was the scrutiny of the State court directed to the latter, as such; the exigency, on the contrary, rendered most apposite, if not imperative, the recognition or discovery of the particular species of contract known as a *covenant*, and a covenant *running with the land*, from which it was a comparatively easy transition to the creation (by such covenant) of "incorporeal hereditaments"—which are *property*, and *real property*; the *taking* of which, as the State court itself has said, "had to be shown,"<sup>1</sup> in order to render it possible to afford any relief to Story, *in the action which he had brought*, and in order to afford Lahr (with whose predecessor *the State* had covenanted) any relief whatever.

The foregoing dual, historical reminiscence renders it possible to set forth the reason why the above-submitted, imaginary Opinion would not have been adequate and accurate, as the prevailing Opinion of the United States court in the Muhlker case.

That Opinion would *not* have been objectionable because there was, in the situation, a lack of the element of a public use—"this improvement was made by the State for the benefit of the public";<sup>2</sup> nor because ostensible statutory authority was wanting—there was L. 1892, chapter 339; nor because that statute made provision for compensation—"no provision for compensation is made in the statute";<sup>3</sup> nor because Muhlker had not pri-

<sup>1</sup> 129 N. Y. 587.

<sup>2</sup> *Id.* p. 555.

<sup>3</sup> 173 N. Y. 552.

vate property, to wit, the three notable easements, in Park avenue—his “easements of light, air and access” are specifically referred to.<sup>1</sup> The reason why that tentative Opinion would not have sufficed is, that there was no concession that the statute of 1892 *took* (*i. e.*, provided for *taking*) private property of the plaintiff. The governing Opinion<sup>2</sup> does not use the verb “*take*” in relation to Muhlker’s property (easements). On the contrary, mention is made of “the interference with his easements” ;<sup>3</sup> and see such expressions as: “Where the property of an abutting owner is damaged, or even his easements interfered with” ;<sup>4</sup> “no direct invasion of any private property of the plaintiff ;”<sup>5</sup> “remote or consequential damage or loss” ;<sup>6</sup> and “partial destruction of their easements of light, air and access”.<sup>7</sup> Whereas, of the elevated street railroad companies, it is said, in the same Opinion, that a corporation “*took* certain easements belonging to abutting owners, which it was compelled to compensate them for.”<sup>8</sup>

In short, the highest State court applied the Radcliff doctrine to Muhlker. His property (easements) was damaged, *absque injuria*. And why, as already queried, should it not have done so? The Radcliff doctrine is law, in the State of New York, to-day, standing alongside the Story-Lahr-Kane, *taking* doctrine; and the relation of the two doctrines is indicated by the circumstance, that,

<sup>1</sup> 173 N. Y. 551, 557.

<sup>2</sup> *Id.* p. 551.

<sup>3</sup> *Id.* p. 555.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* p. 557.

<sup>8</sup> *Id.* p. 556.

because the damage to abutters was deemed to be inordinately great, the rigor of the Radcliff rule was relaxed, a "taking" of private property, which practically annulled the benefit of the *covenant* was judicially recognized, and payment of compensation was enforced.<sup>1</sup>

Having, then, it will be assumed, discovered the reason why the foregoing, tentative Opinion would have failed to be satisfactory, it may be permissible, again proceeding tentatively, to reconstruct it, and suggest the following query:

Is the substance of the United States Court's prevailing Opinion contained in the following?

(The State of New York, in 1892, through its legislature, provided for a public improvement by a statute which concededly interfered with—indeed, concededly partly destroyed—property of the plaintiff in error, consisting of certain easements in a public street whereon his lot abutted, and which statute made no provision for compensation to him. We think that there is a principle of law which could be resorted to, in order to render those who wrought such damage liable for their work, viz.: that the interference with these easements became a taking of them, *pro tanto*, as was said by the court below, in *Bohm v. Met. El. R. Co.*,<sup>2</sup>—this language being used in reference to cases (of elevated street railroads) undistinguishable from the present, so far as the cause, kind and *quantum* of damages is concerned; unless it should be considered that the last item was *greater* in the case at

<sup>1</sup> See 129 N. Y. 587.

<sup>2</sup> 129 N. Y. 587, 588.

bar. A statute providing, in effect, for such taking of private property, and containing no provision for compensation, is, within the adjudications of this court, a deprivation of property without due process of law, and void. The defendants, therefore, acting wholly without lawful authority in the maintenance of the viaduct in Park avenue, and running their trains thereon, were trespassers, and plaintiff was entitled to judgment against them. No reason appearing for an interference, by this court, with the nature or amount of the relief awarded to plaintiff on the trial of his action, the judgment under review must be reversed, and plaintiff's original recovery affirmed.)

It may be advanced, in favor of the foregoing, as the substance of the prevailing Opinion in the final tribunal, that one infringement, by a State, of the United States Constitution <sup>1</sup> was *enough*, to give the federal court jurisdiction, and to effect the result which has in fact been effected by its decision. No objection is discerned to an adoption, by the court of ultimate jurisdiction, as a step in its logical process, of an equitable expedient employed by the State court, and announced by it as explaining and justifying an adjudication of a "taking" of property, where the State's acts bear too heavily on the private owner, even though that expedient was not employed, by the latter court, in the later instance. But these suggestions, which have been presented in a spirit of great deference, are not urged, and have only been made because

<sup>1</sup> XIV Amendment.



they came into mind in the course of a sincere effort to identify the *rationale* of the Opinion under examination.

It is undoubtedly true that the matter, latest above suggested, was *not* the prevailing Opinion which was in fact handed down in the United States court; for, in the former, "contract" plays no visible part, while, in the Opinion under consideration, the elements of "contract," and its "obligation," are pointedly referred to, namely, in the statement of the "ground of decision."

This circumstance leads to an analysis of the contract-obligation-impairment clause of section 10 of article 1 of the United States Constitution, to which attention will now be addressed, in the further pursuit of the main purpose. A study of that clause naturally arranges itself under three heads: Contract; Obligation of a Contract; and Impairment of such obligation.

Contract.—In *Fletcher v. Peck*,<sup>1</sup> the facts were, that the State of Georgia, through its governor and in pursuance of legislation, had made a grant of land, which grant a subsequent legislature annulled on charges of fraud in procuring the grant. In the Opinion, which was written by the great chief justice, it was said:

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. Such was the law under which the conveyance was made

<sup>1</sup> 6 Cranch, 87.

by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. . . . A law annulling conveyances by individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances." <sup>1</sup> This language of the court has been quoted, as clearly exhibiting the import of "contract," in the tenth section of the first article of the United States Constitution. <sup>2</sup>

Obligation of the Contract.—The propositions, that the obligation of a contract inheres and subsists in the contract; that, when one enters into a contract to do or abstain from an act or acts, his obligation is, purely and only, to so do or abstain, or else pay damages for non-performance, or non-abstention; in short, that the obligation of a contract is, legally, not distinguishable, or, at least, not severable, from the contract itself—are apt to strike the professional, and any other, mind as

<sup>1</sup> Per MARSHALL, Ch. J., *ubi supra*.

<sup>2</sup> *Supra*.

being not only correct but manifest. And an affirmation of these positions would seem to have met the approval of Chief Justice MARSHALL, who said:

“No State shall ‘pass any law impairing the obligation of contracts.’ These words seem to us to import that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subject of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original, intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our Constitution took the same view of the subject, and the language they have used confirms this opinion.”<sup>1</sup>

But in *Sturges v. Crowninshield*,<sup>2</sup> the Opinion of the United States Supreme Court, after defining a contract as “an agreement in which a party undertakes to do, or not to do, a particular thing,” continued: “The law binds him to perform his undertaking, and this is, of course, the obligation of his contract.”<sup>3</sup>

<sup>1</sup> Dissenting opinion, in *Ogden v. Saunders*, 12 Wheat. 213, 354 (1827).

<sup>2</sup> 4 Wheat. 122 (1819).

<sup>3</sup> Per MARSHALL, Ch. J.

In *Ogden v. Saunders* (*ubi supra*), it was said by the same court: "The obligation of the contract consists in the power and efficacy of the law which applies to and enforces performance of the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term 'obligation.'"<sup>1</sup>

"What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of *Sturges v. Crowninshield*, to which I readily assent now, as I did then. It is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction or discharge."<sup>2</sup>

"So little progress has been made in fixing the precise meaning of the words 'obligation of a contract,' that I should turn in despair from the inquiry, were I not convinced that the difficulties the question presents are mostly factitious, and the result of refinement and technicality; or of attempts at definition made in terms defective both in precision and comprehensiveness. . . . The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that

<sup>1</sup> *Id.* per TRIMBLE, J.

<sup>2</sup> *Id.* per WASHINGTON, J.

right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law.”<sup>1</sup>

“As I understand it, the law of the contract forms its obligation.”<sup>2</sup>

Thus it is seen that the obligation of a contract is a thing legally separable and separate from the contract itself—it is *the law*.

Impairment of the Obligation.—Authorities have already been cited, explicitly to the effect that an infringement of article 1, section 10 of the United States Constitution, in respect of impairing the obligation of a contract, is accomplished only by and through the Constitution or a statute of a *State*. “No *State* shall *pass a law*,” etc. In addition to those affirmative authorities, a negative ruling, to the same effect, may be cited from a recent decision:

“Considerable stress has been laid upon the case of *Louisiana v. Pilsbury*,<sup>3</sup> as an authority for the proposition that the obligation of a contract may be impaired by a change in the construction given to it by the courts of a State, and that a federal question under the contract-impairment clause of the Constitution is thus presented, which may be reviewed in this court. . . . There is no

<sup>1</sup> *Id.* per JOHNSON, J.

<sup>2</sup> 105 U. S. 278.

<sup>3</sup> *Id.* per THOMPSON, J.

decision in the case which gives the least support to the proposition that jurisdiction exists in this court to review, on writ of error to a State court, its holding as to what the contract was, simply because it had changed its construction thereof, nor that the obligation of a contract may be impaired, within the contract clause of the Constitution, unless there has been some subsequent act of the legislative branch of the government to which effect has been given by the judgment of the State court."<sup>1</sup>

It is believed that the necessary foundation has thus been laid for propounding a theory of the operation of these doctrines, in the "ground of decision," announced in the prevailing Opinion of the United States Supreme Court, in the principal case; the most prominent, pertinent passages in the judicial statement of which will be again quoted:

"When the plaintiff acquired his title, those cases <sup>2</sup>were the law of New York, and assured to him that his easements of light and air were secured by *contract*, as expressed in those cases, and could not be *taken* from him without payment of *compensation*. And this is the ground of our decision. . . . When there is a diversity of State decisions, the first in time may constitute the *obligation* of the contract." The italics are not in the original.

In the words "contract" and "obligation," above emphasized, there would seem to be an intimation

<sup>1</sup> Per PECKHAM, J., in *Bacon v. Texas*, 163 U. S. 207, 222, 223.    <sup>2</sup> Story and Lehr.

that the federal decision turned on article 1, section 10 of the United States Constitution; while from the presence of the words "taken" and "compensation," under principles above stated, the fourteenth amendment (due-process-of-law clause) might be imagined to have furnished the ground of reversal.

Indulging, in the first instance, an hypothesis that the "ground of decision was a violation of the contract-clause, it is proposed to attempt to identify the following items or elements, apparently referred to, or *implied*, in the prevailing Opinion in the Muhlker case: (1) the *contracts* concerned and contemplated in and by that Opinion; (2) their respective *obligations*, including a conclusion as to the time when, and the means whereby, such obligations were "constituted;" and (3) the act or acts of the State, if any, by which it was *held* that the obligation of Muhlker's contract was (attempted to be) impaired.

First.—Under the first of these heads, it will be necessary to refer, in some detail, to each of four different contracts, two of which have already been mentioned and partly discussed.

(a) *The Story contract*.—Rufus Story owned two lots abutting on Front street, Manhattan Island, city of New York, his title to which came through two grants from the city, as proprietor, made in 1773, when the lots were yet under water, to De Peyster and Ellison, which grants conveyed, besides land embracing the lots in question, the beds of two streets, on one of which those lots abutted,

and which grants contained a covenant that the grantees would erect and make a good and sufficient, firm wharf or street,<sup>1</sup> and another parallel street,<sup>2</sup> which said several streets, the instrument continued, "shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be."

The peculiar effects of these instruments of conveyance from the city, as believed to have been adjudged in 1882, are worthy of notice. By the granting clause proper, the fee of the streets, along with that of the rest of the land conveyed, passed from the city to the grantees; by their covenant to erect and make a (public) street, the fee of the land of the street must have reverted to and vested in the city, for the Story Opinions seem to have *held* the fee of the street to have been in the city; the stipulation that such street shall "forever thereafter continue and be for the free and common passage," etc., *i. e.*, should forever be kept open as a public street, was (treated as) a covenant of the city, the primary grantor, and *held* to enure to the benefit of the lot owners (the grantees), and, inasmuch as it "ran with the land," to the benefit, also, of their successors in title, all of whom became, or were destined to become, by virtue of the transaction, "abutters" on the public street.

<sup>1</sup> The present Front street.

<sup>2</sup> The present South street.



The Story contract, then (for the search, at present, is for a *contract*), was the covenant of the city (grantor, and then grantee, of the bed of the street), with the abutter, that the street should "forever continue and be for the free and common passage of," etc., which was construed to mean that it should never be devoted to uses inconsistent with the purposes of a street (and an elevated, steel, railroad viaduct was *held* to be so inconsistent).

(b) *The Lahr contract*.—A distinction, in this case, from that of Story, which, however, did not affect the main result, is that the *State* of New York took a part in the origination of the street. West Third street, on which Lahr's lot abutted, was originally part of land belonging to a private owner, Lahr's predecessor in title, and was laid out and opened under a statute of 1807–1813, by the terms of which the fee of lands to be taken thereunder for public streets, etc., was vested in the city of New York, "in trust, nevertheless, that the same be appropriated and kept open, for or as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city are and of right ought to be." The operation of the legal machinery mentioned, as the same is understood to have been adjudged in 1887, was as follows: The State, through the city as its agent, took a strip of private property (land) for a public street, and vested the title to the fee or soil of the latter in the municipality, as *trustee* for the *public*. There was no express *covenant* here. In the Story case,

there was a covenant, but not trust. But, though the general public was the only *cestui que trust*, strictly speaking, a covenant was *held* to be *implied* in and by (a) the act of 1807-13, and (b) the proceedings taken thereunder; to wit, a covenant made by the State with abutting owners among others, namely, with all those who were liable to be assessed for benefits, which covenant ran with the land.

The Lahr *contract*, then, of which we are in search, was the implied covenant of the State, taker of the land which became a public street, made with the abutter, that the same should be appropriated and kept open, for and as part of a public street.

It being impossible for an individual to sue a sovereign State, without permission, the circumstance of the existence of a *contract* (whether a covenant or other) in Lahr's case, could, on principle, have been of no avail to him, as respects any *direct* remedy for a breach—a reflection which emphasizes the proposition that Lahr's success in securing relief in the State court in 1887 was due exclusively to the decision of that court that the (implied) covenant made with the abutter, then discovered in the street origin, created private (real) property (easements) of the abutter in the public street; which position being reached, the *sequelæ* of the Story taking-doctrine, and the adaptation of the statutes and practice of eminent domain, operated to ensure and apply his remedy. Whether a State, after making a contract with an individual, and subsequently impairing the obliga-

tion of that contract, by its legislation, could be *held* liable, to the aggrieved, under our composite, politico-juridical system, on the ground of a violation of the United States Constitution, is a question which never arose, and could not arise, in Lahr's case, because the obligation of no contract was ever impaired, nor sought to be impaired. For the "rapid-transit" acts of the State legislature duly provided for just compensation for private (real) property, to be taken, and the only way in which a difficulty between the elevated railroad companies and the abutters arose was, that the railroad company, the State's agent, omitted to comply with the instructions of its principal—the statutory direction to pay before taking.

(c) *The New York National Exchange Bank contract.*—The case of this corporation is mentioned here because, as will be seen, by reason of the date when it was decided, it has a logical relevancy to the "ground of decision" announced in the prevailing Opinion of the United States court in the Muhlker action. The Bank action was decided, by the Court of Appeals, February 28, 1888, before Muhlker bought the northernmost third of his lot, in plaintiff's favor, without Opinion. It was brought against one of the elevated street railroad companies for an injunction and damages, on the assumption that the Story and Lahr decisions were valid precedents, though the important, definite element of a covenant, which was present, and proved so potent as a creator of "property," in each of the two earlier cases, was lacking in the

history of the bank's title. Plaintiff was *lessee* of a lot abutting on a street of the city of New York known as College place, over which defendant's road had been constructed,—the uniform, steel viaduct,—plaintiff's lessor (owner of the lot) being Trinity Church Corporation, which, by a deed dated in 1761, had conveyed the street in question, with others, to the city, "to have and to hold all and singular the said several and respective streets unto them, the mayor, aldermen and commonalty of the city of New York, for the free and common passage of, and public streets and ways for, the inhabitants of the said city of New York, and all others passing and returning through or by the same, in like manner as the other public streets of the said city now are or lawfully ought to be." The city of New York accepted the conveyance. The General Term of the New York City Superior Court affirmed a judgment which plaintiff had recovered on the trial, saying: "The easement in question has its origin in a cession, by the Trinity Church Corporation, of the streets named, to the city of New York, for street purposes. In this respect, the case at bar is identical with the case of *Glover v. Manhattan R. Co.*;<sup>1</sup> *N. Y. Nat. Ex. Bank v. Met. El. R. Co.*"<sup>2</sup> In the *Glover* case, so referred to, the General Term had affirmed a judgment, in plaintiff's favor, on the Opinion of the Special Term, in which it had been said: "The fee of Greenwich street, in front of plaintiff's property, passed to

<sup>1</sup> 51 N. Y. Superior, 1.

<sup>2</sup> 53 N. Y. Superior, 511, 512;  
aff'd 108 N. Y. 660, Feb. 1889.

the city of New York by the deed from the Church corporation dated 1761, but by the conveyance the property conveyed was to be held by the city as a public street forever; the city accepted the conveyance subject to this condition, and this, I think, gave the owner of the adjoining property the right and privilege of having the street kept open forever as such, and the Court of Appeals, in the case of *Story v. The N. Y. El. R. R. Co.*,<sup>1</sup> has decided that such right was 'an incorporeal hereditament; that it became at once appurtenant to the lot and formed an integral part of the estate in it,' and constituted a perpetual incumbrance upon the land burdened with it. The lot became the dominant and the open way or street the servient tenement."<sup>2</sup> It thus appears that, the "right" of the bank, as an abutter, to have the street kept open forever as such, having been shown, the Story doctrine of the origination of a species of private (real) property in a public street, was applied with all its consequences, although the creative *covenant*, so carefully pointed out by the court in the Story case, was absent. The Lahr decision was not cited, by the Superior Court, in either the Bank or the Glover case.

The "right and privilege of having the street kept open forever as such," thus declared to belong to Glover, and to the bank, were evidently conventional in their origin; and therefore, though there was no *covenant*, and though no contractual element is referred to, in either Opinion, it is a necessary

<sup>1</sup> 90 N. Y. 145.

<sup>2</sup> 51 N. Y. Superior, 14.

inference from the Opinions, and the results of the decisions, that a *contract* was impliedly recognized as the source of the existence of the street easements. It is, therefore, believed to be proper to say that:

The bank-contract, *i. e.*, the contract, the benefit of which was enjoyed by the New York National Exchange Bank, as lessee, was the deed of 1761, given by the Church, owner and lessor of the lot in question, ceding the street to the city for *street purposes*, and accepted by the latter. This *executed* contract being assumed, it, equally with the executory contract (covenant) expressed in the deed between the city and Story's predecessor, and equally with the executory contract (covenant) implied in the Lahr statute *plus* proceedings thereunder, had, of course, *its obligation*.

The evolutionary progress of remedial justice, administered to elevated, street railroad abutters, soon reached its final stage, namely, February 13, 1891, when, in the Kane case,<sup>1</sup> wherein there was no evidence of any covenant, or other contract, upon which to erect the superstructure of private (real) property in a public street, plaintiff succeeded in securing relief of a like quality and quantity to that accorded to Story, Lahr and the National Bank, the Court of Appeals saying: "The main question presented on this appeal is difficult of solution. There must be a property right in the street, to authorize the maintenance of the action. The plaintiff's easements, or rights in the nature of

<sup>1</sup> 125 N. Y. 164.

easements, are not created by grant or covenant. It is easier to realize the existence of those rights than to trace their origin. They arise, we think, from the situation, the course of legislation, the trust created by the statute, the acting upon the faith of public pledges, and upon a contract, between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be diverted to other and inconsistent uses." <sup>1</sup> Earlier in the same Opinion, it had been said: "The defendant is also entitled to the further admission that, if the rights asserted by the plaintiff in Pearl street could only be created in the mode prescribed by the common law for the creation of easements in land, the plaintiff must fail in his action." <sup>2</sup>

(d) *The Muhlker contract*.—Henry Muhlker's action affected the lot on the northwest corner of One Hundred and Fifteenth street and Park avenue, in the city of New York, having a frontage of seventy-six feet five inches on that avenue, and twenty-six feet on the cross street.<sup>3</sup> He acquired his title to the southerly fifty feet five inches of the lot fronting on that avenue by a deed from one Verity, dated June 6, 1887, and to the northerly twenty-six feet (square) fronting on the same avenue, by a deed from one Smith, dated June 22, 1888. The further history of his title and cause of action is as follows: In 1811, commissioners appointed under a statute of 1807, to lay out streets on the northern

<sup>1</sup> *Id.* p. 185.

<sup>2</sup> One Hundred and Fifteenth.

<sup>3</sup> *Id.* p. 180.

part of Manhattan Island, filed a map of lands, including the lot in question, showing Fourth avenue (afterwards Park) as a street 100 feet wide. In 1826, one Poillon, owner of the land which included the lot in question, and of that part of what afterwards became Fourth avenue lying in front of that lot, caused a map of his land to be made and filed in the New York county register's office; which proprietary map exhibited Fourth avenue and the intersecting streets as laid out in accordance with the first-mentioned official map, Fourth avenue appearing thereon as a street 100 feet wide. On July 24, 1827, Poillon conveyed the fee of certain streets, including that part of Fourth avenue lying in front of the lot in question, to the city, "in trust that the same be left open as public streets for the use and benefit of the inhabitants of the said city forever," which deed referred to the proprietary map above mentioned.

In 1837, the New York legislature enacted an alteration of the map of the city, causing Fourth avenue to appear as 140 feet in width, by the addition, namely, of a strip twenty feet wide on each side of the original 100 feet. In 1850-53, the city of New York duly condemned these additional strips.

Meanwhile, by deed dated June 31, 1827, Poillon had conveyed land including the southerly fifty feet five inches on Park avenue by twenty-six feet on One Hundred and Fifteenth street, of the lot in question, to one Stout, to whose title Muhlker succeeded; and said Poillon, by deed dated June 21,



1827, had conveyed land including the northerly twenty-six feet square of the lot in question to one Perry, to whose title Muhlker also succeeded; each of which deeds contained express references to the aforesaid proprietary map, showing Fourth (afterwards Park) avenue as a street 100 feet wide.

By a deed dated January, 1832, Poillon purported to convey to the New York & Harlem Railroad Company, one of the defendants in Muhlker's action, a strip of land twenty-four feet wide, running along the middle of Fourth avenue, as laid out on the map of the city of New York, between One Hundred and Fifteenth street and One Hundred and Twenty-first street; but that deed was only effectual to convey whatever right in the avenue the grantor had, after he delivered the deed of July 24, 1827, conveying the bed of the avenue to the city.

At what time a steam railroad was first constructed, on Fourth avenue, did not appear in evidence in Muhlker's action. The earliest date proved by defendants was 1872, at which time the road was a surface road, with two tracks.

By laws of New York, 1872, chapter 702, the railroad tracks were increased in number from two to four, and were laid in a cut or depression bounded by masonry walls rising three feet above the surface of the avenue, the tracks at the south line of the lot in question being on a level with the surface of the avenue, and at the north line five feet six inches below that surface. This cut was completed, and trains began to run in it, in 1878.

By act of the Congress, passed in 1890, the railroad bridge over the Harlem river, lying northward from the lot in question, was required to be elevated as soon as the legislation, necessary to authorize a change in the grade of the approach thereto, could be obtained.

This legislation of the State of New York was afforded by Laws of 1892,<sup>1</sup> the effect of which was to elevate the four railroad tracks on a steel viaduct thirty-one feet high and fifty-nine feet broad, consisting of a solid roadbed, resting on solid, longitudinal girders, supported by three rows of columns extending along the avenue. The construction was by the State, the railroad company being compelled to bear one-half the expense, and required on completion, to transfer its traffic to the new structure. The surface of the avenue was restored to its normal condition, except as to the presence of the supporting columns resting on pedestals embedded therein. The operation of trains was transferred to this viaduct February 16, 1897, about 500 trains running over it daily, some at a speed of twenty-five miles per hour. The statute of 1892 concededly made no provision for any compensation for any private property to be taken (only *real* property could be taken *in invitum*, for a railroad) in the execution of its scheme.

From the foregoing *data*, the *contract*, if any, to the benefit of which Muhlker succeeded, in respect of his lot, is to be discovered and identified in its source and its contents. Aid, in so doing, is de-

<sup>1</sup> Chapter 339.

rived from two passages in the prevailing Opinion of the United States court. In one, it is said: "The case is, therefore, presented to us, as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract." The other passage (which alludes to the Lahr case) is: "And rights of abutting owners were *held* to rest in contract constituted by the conditions upon which the city received the property." The intimations here are, and it will be assumed, that Muhlker's *contract* is discernible in the delivery, and acceptance by the city, of the above-mentioned deed of the bed of the avenue, delivered July 24, 1827, coupled with the circumstance that Muhlker traced the title to his lot back to the same grantor, Poillon, who conveyed the avenue to the city. By said deed of July 24, 1827, the bed of Fourth (Park) avenue, in front of the lot in question, with the beds of other streets, was ceded "in trust that the same be left open as public streets for the use and benefit of the inhabitants of the said city forever." Each of the two deeds above mentioned from Poillon to Muhlker's predecessors in title, referring to the grantor's proprietary map, which showed Fourth (Park) avenue as a street whereon the property conveyed abutted, the transaction was one of the simple and familiar instances of a private right to the benefit of a public street, arising from a dedication, by the owner, of land of a street to the public; the making and filing of a map showing the street; and conveying lots abutting on the street by deeds referring to the map.

This *contract*, which is now assumed to have been identified, and to the benefit of which Muhlker succeeded, bears, certainly, a much closer resemblance to what has been referred to as the Bank contract than it does to either that of Story or that of Lahr. In the Bank case, it is true, the grantor (dedicator) of the street still remained, when the bank sued, owner of the lot concerned, and the bank was its lessee; so that there were not successive owners of the fee of the lot, subsequently to the cession or dedication of the street, as there were in Muhlker's case. But this difference in title-succession gave rise to no distinction in principle.

Second.—The respective *obligations* of these four contracts, and the time when, and the means whereby, such obligations were severally "constituted."

It has been seen that "the obligation of a contract does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract." There is always, of necessity, some law applicable to a contract at the time when such contract is made. A possible way of describing the obligation, common to all four of the contracts, which have been above sought, and perhaps found, is, that such obligation was *the law* imposing, *on the owner of the street*, for the time being, the necessity of leaving or keeping it open as a public street, for the benefit of the abutter, as distinguished from the public. This, it is submitted, is all there was of the obligation of Story's contract when it was made (1773); all there was of the obligation of

Lahr's contract when it was made (say in 1813); all there was of the obligation of the Bank's contract when it was made (1761); and all there was of the obligation of Muhlker's contract when it was made (1827).

The existence of an obligation (which is implied in the existence of a contract) involves the possibility of the eventuation of a cause of action; for there is always a legal remedy for a breach of the obligation of a contract, available when the contract is made. *Ubi jus, ibi remedium*. It is supposed to be clear that, at the several times when these four contracts were made, the legal remedy for the enforcement of such cause of action, in case the street should not be left or kept open, as such, was an action against the contracting obligor or his or its successor in title to the street, to recover damages for the breach of the contract, or to secure an injunction to prevent a breach threatened or the continuance of a breach accomplished. The assertion is ventured that, up to the time of the Story decision, such a cause of action was ranged, in legal classification, in the category of *personal* property. It is further to be noted that no such remedy would be available as against a sovereign State, which cannot be sued by an individual, *in invitum*.

Can it be doubted that, in the measurably complicated legal concepts, to the contemplation of which the discussion has led, there is necessitated a conclusion, that an *additional* obligation, of a contract, may be "constituted" (viz.: by the law) after the

contract is made? It is believed not. The authority for such a conclusion is found in the prevailing Opinion. "When there is a diversity of State decisions, the first in time may constitute the obligation of the contract, and the measure of rights under it." This judicial observation was a reference to the Story and Lahr decisions, in the State court, as antedating that in the Muhlker action; the Bank decision, apparently, not having attracted attention.

Therefore, the Story decision, of 1882, constituted the obligation (which was the only one of possible value to Story *in his action*) of the contract (covenant) made between the city and Story's predecessor, in 1773; the Lahr decision, of 1887, constituted the obligation (which was the only one of possible value to Lahr, *in any event*) of the contract (covenant) made between the State and Lahr's predecessor, say in 1813; the Bank decision, of 1888, constituted the obligation (which was the only one of possible value to the bank, *in its action*) of the contract (no covenant) made, between the city and the bank's lessor, in 1761; and—Muhlker's predicament being considered *in consimili casu* with Story's and Lahr's—the Story and Lahr decisions, made before Muhlker bought, constituted the obligation of the contract (no covenant) consisting of (a) the delivery and acceptance of the deed from Poillon to the city, in 1827, of the fee of the street, coupled with (b) the filing of a map, and (c) the conveyance of the land of the lot in question to Stout and Perry, in the same year.

If the objection should be taken, to this doctrine of the constituting of an obligation of a contract, in favor of one party, *after* the contract is made, that thereby the obligation of the contract would be impaired, so far as the other party thereto is concerned, namely, by increasing the burden of the latter, the answer is believed to be: 1st, the law constituting the obligation, in this case, was made by the courts, and no constitutional provision prohibits them from impairing obligations; 2d, Muhler was not suing the city of New York, which city therefore was not in any danger of being mulcted, either within or beyond the extent of its *obligation*.

So, one hundred and nine years (1882) after the Story contract was made (1773), seventy-four years (1887) after the Lahr contract was made (1813), one hundred and twenty-seven years (1888) after the National Bank contract was made (1761), and fifty-five or sixty years (1882, 1887) after the Muhler contract was made (1827), the respective obligations of those several contracts—each, in substance, to leave or keep the public street open, as such—were “constituted,” in this: the obligation became creative of private (real) property in a public street (such obligation assuming, for this purpose, a private phase in the case of Lahr, whose predecessor became, in 1887, a private *cestui* of a statute-trust created, in 1813, for the public)—this was its substance: and the presence and use of a steel railroad viaduct over the street, became (1) a negation of street openness, and, therefore

(2), a *taking* of private property *in invitum*—those were its indispensable incidents.

The obligation of the contract made with Muhler's predecessor, in 1827, was constituted by the law (of judicial decision) as it stood when he took title to his lot. When he acquired the southerly fifty feet five inches of that lot (June, 1887), the Story and Lahr decisions were the law (1882, 1887). When he acquired the remaining twenty-six feet square the National Bank decision had been made, and, presumably, at least in respect to that frontage, he was entitled to the relaxation in the law made by that decision in favor of abutters, consisting of a dispensation with the necessity of a covenant. But the last-named precedent was not referred to in the prevailing Opinion, which observes: "The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888. The first of the elevated railroad cases was the Story case, decided in 1882."

This view of the *modus* and medium of constituting the obligation of these contracts is believed to be in accord with the Opinions of all the courts concerned:

"Now the elevated roads take no land from the abutter. They stand wholly on land owned by the municipality, and no consequential damages, flowing from the lawful corporate user, could be recovered, but for the fact that some of them, though not all of them, have been by the Story case transformed from consequential injuries into invasions of property rights. To the extent of that



transformation the rule of damages must feel the effects of the change, but beyond that the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also into invasions of property, and add a new brood of easements to those already awarded to the abutters, instead of leaving them where the Story case left them, the mere incidents of a lawful use."<sup>1</sup>

"The plaintiffs own no land in the street. The ownership of the land is bounded by the exterior lines of the street itself. Hence when, under legislative and municipal authority, the railroad structure was built, it was supposed by many there was no liability to abutting owners because no land of theirs was taken and any damage they sustained was indirect only and *damnum absque injuria*. When the courts acquired possession of the question and it was seen that abutting land which before the erection of the road was worth, for instance, \$10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, has a kind of property in the public street for the purpose of giving to such land facilities of light, of

<sup>1</sup> *Am. Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 271 (1891).

air and of access from such street. These rights of obtaining facilities of light, etc., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property and were protected by the Constitution from being taken without just compensation. It was *held* that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent land owner, and in law took a portion of them. By this mode of reasoning, the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and therefore not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendant's road. For the purpose of permitting such a recovery, the taking of property had to be shown." <sup>1</sup>

To this may be added the following:

"The characterization of these street rights as easements, and implying that they are governed by the rules and are subject to the limitations of common-law easements tends to obscure the rights of abutting owners on the one hand and of the cor-

<sup>1</sup> *Bohm v. Met. El. R. Co.*, 129 N. Y. 587 (1892).

poration on the other. They may be easements in the sense that the owner of land has an easement for lateral support in adjacent land, or that the owner of land bordering on navigable waters having certain private rights to the shore is sometimes said to have an easement, but in neither case are the rights common-law easements. There is no dominant nor servient estate, and the rules applicable to easements have not generally been applied to such rights.”<sup>1</sup>

“When there is a diversity of State decisions, the first in time may constitute the obligation of the contract.”<sup>2</sup>

“The plaintiff’s rights, whether expressed in terms of property or of contract, are all a construction of the courts. . . . They were never granted to him or his predecessors in express words or, probably, by any conscious implication.”<sup>3</sup>

These separate, harmonious expositions of a theory of the constitution of the obligation of a contract, some emanating from the highest State court, and the others found in the prevailing and in the dissenting Opinion, respectively, of the United States Supreme Court, are necessarily conclusive.

3. The means whereby the obligation of (what will now be called) the Muhlker contract—meaning that made by and through the Poillon transactions of 1826, 1827—was (attempted to be) impaired by the State, next demand attention.

The Muhlker contract was the only one of the

<sup>1</sup> *Stevens v. N. Y. El. R. R. Co.*,  
130 N. Y. 95 (1891).

<sup>2</sup> *Muhlker*, Prevail. Fed. Opin.

<sup>3</sup> *Id.* Dissent. Opin.

four contracts heretofore considered, the obligation of which was (attempted to be) impaired, as has been seen. If, now, the obligation of that contract was impaired, or attempted to be impaired, the only way in which this could possibly have occurred was by the enactment of New York Laws 1892, chapter 339.

Is it the theory of the prevailing Opinion that that statute impaired the obligation of the Muhlker contract? If this question ought to be answered in the affirmative, it would be needless to search that Opinion for evidences of a theory that the State had violated the Fourteenth Amendment—deprived Muhlker of property without due process of law—for, in the contract-clause of the Constitution, the federal court would find the source of its jurisdiction to entertain the appeal, and the ground for the reversal which it has accorded to the appellant.

In order to determine in what manner the latest inquiry ought to be answered, a portion of the “ground of decision” will be again quoted from the prevailing Opinion:

“When the plaintiff acquired his title, those cases were the law of New York, and assured to him that his easements of light and air were secured by contract and could not be taken from him without payment of compensation. . . . The power of the courts of New York to declare rules of property, or change or modify their decisions . . . cannot be exercised to take away rights which have been acquired by contract and have come under

the protection of the Constitution of the United States. . . . When there is a diversity of State decisions the first in time may constitute the obligation of the contract, and the measure of rights under it."

Applied to the facts of Muhlker's case, these judicial declarations may be deemed to involve, or imply, the following legal proposition: Under the Poillon *contract* (of 1826, 1827), Muhlker, when he bought (1887, 1888), acquired by *the law* (the Story and Lahr decisions of 1882-1887), the benefit of the *obligation* of that contract, which, in one phase, may be described as a "right" to have a railroad viaduct kept out of Park avenue.

So far it is plain sailing under section 10 of article 1 of the United States Constitution. But a puzzle is encountered, upon realizing that there is a necessity to continue with an inference that this "right" was "taken away" (obligation of contract impaired) by the Muhlker decision, made by the State court in 1903. For, obligation of contract can only be impaired by a State Constitution or statute (see *supra*), and it cannot have been the intention to overrule that established doctrine. In this dilemma, turning back to the early part of the prevailing Opinion, the following passage is found: "The case is, therefore, presented to us as to the effect of the deed of Poillon to the plaintiff and to the city, as constituting a contract, and the effect of the act of 1892 as an impairment of that contract, or as taking plaintiff's property without due process of law."

Here the requisite *legislation* is pointed out, and, though the statute is nowhere in the Opinion declared void, and is not mentioned in the "ground of decision," it may be permitted to infer that this statute was deemed to effect "an impairment" of the obligation of the Poillon contract; so that, in some way, impairment of contract-obligation may have entered into the theory of the Opinion.

Another theory of this Opinion, however, insists upon presenting its claim to entertainment. The declarations that plaintiff's "easements of light and air . . . could not be taken from him without payment of compensation," and that "the permission or command of the State can give no power to invade private rights, even for a public purpose, without payment of compensation," together with the reference to "taking plaintiff's property without due process of law," furnish unmistakable indications of the recognition of the fourteenth amendment, as lying at the foundation of the decision.

*The case was probably decided on two grounds.*

A suggestion as to the relation which those grounds sustain to each other, will be ventured, not without an appreciation of the difficulty of the attempt, and of the danger of unwittingly falling into error in making it.

(A) The Poillon transactions, of 1826, 1827, originated a contract, to the benefit of the obligation whereof Muhler, on buying, became entitled, on long-established principles, such benefit being: to have Park avenue left open as a public street, as

specified in the Poillon-city trust-deed; the Story and Lahr decisions constituted the (an) obligation of this contract, they establishing as *the law*, that the railroad viaduct did not leave the avenue open, as required; the Act of 1892, in providing for the viaduct, and thus for partly closing the avenue, impaired that obligation, and so was void; and plaintiff was entitled to recover against defendants as trespassers.<sup>1</sup>

(B) The Story and Lahr decisions, by reasonably liberal inference, established, as the law, when Muhlker bought—that certain abutters (in like plight with Muhlker) had, and therefore that Muhlker, should he buy, would have, private property (easements) in Park avenue, and that the railroad viaduct and its operation (undistinguishable, in their effects, from the street railroad viaduct) *took* such property; the Act of 1892, in providing for such *taking*, without providing for compensation, was void as against Muhlker, as depriving him of his property without due process of law; and plaintiff was entitled to recover against defendants as trespassers.<sup>2</sup>

Each of these two latest analyses, which severally submit different but not inconsistent theories of the tenor of the prevailing Opinion, is vitally dependent on holding to a phase of the Story and Lahr decisions, as a step towards the conclusion that the United States Constitution had been infringed.

<sup>1</sup> See U. S. Const., art. I, § 10.

<sup>2</sup> See U. S. Const., XIV amendment.

Unless the peculiar tenet, that a railroad viaduct over and along a street negatived the latter's being kept open as a public street, had been adhered to, a contract-obligation would not have been found to be impaired, as per "(A)."

Unless the peculiar tenets, of the creating of private property in a street, and of the *taking* of that property by such a viaduct, had been adhered to, a deprivation of property without due process of law would not have been found, as per "(B)."

Hence, the essential and ultimate foundation of the recent interesting and important decision of the United States Supreme Court (Muhlker case) appears to be—a vested right, in one acquiring property, to an immutability of State judicial decision, where the value of his acquired property would be depreciated by an overruling of such decision—a view apparently in accord with judicial expressions contained in the Dissenting Opinion.

*"Il est difficile de decider."*

LA BRUYÈRE, *Les Caract.*



## II.

### THE OFFICE OF PRESIDENT OF THE UNITED STATES OF AMERICA.

The aim, or function, of this article is, to recall, to sense, the juristic concepts found to cluster about the office designated in its caption. With this end in view, an attempt will be made to confine attention to the *office*, apart from personality, and to consider history and the law, without wandering into Utopia, or doling *ex-cathedra* didactics.

It will be convenient to note, at the outset, what the law says on the question of the meaning of "sovereignty." The definition of that term, given by Wheaton, will be assumed and accepted as adequate and accurate. "Sovereignty," that writer states, "is the supreme power by which any State is governed." <sup>1</sup> Sticking to this definition will guard against the lure of the will-o'-the-wisp, "that flickers, where no foot can tread," around the *doctrine of sovereignty*,—"a suspicious phrase,"—than which "no offender" of its kind, it has been asserted, "has given more trouble," through confusion of thought and language, "in those territories where the limits of co-terminous sciences have not been exactly drawn." <sup>2</sup>

<sup>1</sup> Internat. Law, 2d Eng. ed.,  
p. 28 (1880).

<sup>2</sup> Bryce, Stud. Hist. & Jurisp.,  
p. 503 (1901).

Since the declaration, which affirmed "the right of the people" to alter or abolish any form of government, and to institute such new one "as to them shall seem most likely to effect their safety and happiness," it will not be denied, that, in this country, sovereignty resides *in the people*. But it is important to observe that this residence is in the people, as organized, at least acting unitedly; and not in individuals in their multiplicative isolation. "Political sovereignty is the assertion of the self-determinate will of the organic people" ;<sup>1</sup> a principle which relieves from the mental and practical embarrassment attending the chimera of eighty million sovereign citizens, including women and children, engaged in running a political machine by delegating an unqualified, exclusive, plenary and unlimited number of their "sovereignties" to a vicar, modeled after the English King, crowned with an aureole illumining the legend, "*Cave lèse majesté*."

A people united in an organic whole being intrinsically endued with the quality of unity,—out of this primary attribute spring many corollaries. Unity of sovereignty is one. The supreme power by which a *State* is governed, though conceivably capable of apportionment, as regards the agencies through which it may be exercised, is necessarily other than manifold. To this effect, Mulford: "Sovereignty implies unity; this belongs to the necessary conception of the will from which sovereignty proceeds, and in the will alone in which

<sup>1</sup> Mulford, *Nation*, p. 129.

there is the highest and essential unity, is the postulate of sovereignty." <sup>1</sup> Accordingly, it will not be a function of this paper, to deal with "sovereignties," either as attributes or as powers, active or passive, of the federal government of these United States, or of any department or officer thereof, or of its citizens.

The adulatory aspirant may find himself able to contemplate, without convulsions, the spectacle of a sole corporation clothed with majesty, and loaded, as to his pockets, with innumerable sovereignties, hurled right and left, *in rotation*, at crying needs or evils which are neglected by the Constitution, Congress and Courts. The student of political history and law, having not eaten of "the insane root that takes the reason prisoner," may discover the supreme power, in a State, manifesting itself in unity, and ordinarily wielded amidst less strenuous circumstances.

Logically, though sovereignty is thus essentially *one*, this assertion is, of course, made only with reference to a single State. Given two separate, independent States, two sovereignties are conceded, although there is, properly, no plural to this abstract term. A federation of States presents a peculiar problem. That dual system of government which prevails over the States whose aggregate territory comprises the middle belt of the (North) American continent, stands unique in history. It cannot be otherwise than true, of each of the original thirteen colonies, that, when the subtraction of

<sup>1</sup> Nation, *ubi supra*.

its allegiance to the British crown became at length consummated, each organic body emerged, clothed with the sovereignty of a free and independent State. The only possibility of cavil, anent this proposition, arises from the fact that each of the thirteen "semi-independent States"<sup>1</sup> voluntarily surrendered a portion of its sovereignty, for federative purposes, before that sovereignty was achieved. But, whatever be the true theory of a transaction which apparently partook of the character of a political "sale to arrive," inasmuch as the ship got over the harbor-bar, the important consideration is, that the supreme power, in each colony wrested from Great Britain, subsequently vested elsewhere, and, as is true of all corporations, aggregate or sole, has survived hitherto, and is destined to survive, not in perpetuity, perhaps, but in reasonable persistence, attributes and powers—including unity.

Where is the sovereignty of one of those States to-day?

After the declaration of July 4th, 1776, the revolutionary struggle proceeded until the ratification of a definitive treaty of peace, January 14th, 1784. Meanwhile, the respective colonies, between 1778 and 1781, had been successively ratifying the Articles of Confederation and Perpetual Union—the fundamental compact of a league styling itself "The United States of America." The second of those articles provided as follows:

"Art. 2. Each State retains its sovereignty, free-

<sup>1</sup> Bryce, *supra*, p. 104.

dom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled."

Those articles, for the first time, made an express delegation of powers to a general government, there being, throughout the revolutionary period, no other express separation between the sphere of the latter and the spheres of the State governments, respectively.<sup>1</sup> The experience of the people under those articles prepared them to submit peacefully and cheerfully to the new revolution, whereby the confederated government was permitted to drop out of existence, and a new Constitution (adopted between 1787 and 1791) was ratified as the fundamental law of the land.<sup>2</sup>

On March 4th, 1789, when the Constitution of the United States took effect in eleven States, the tie existing under the Articles of Confederation was manifestly dissolved, and the relations of those States, to each other, and to the general government, became exclusively such as were prescribed by the Constitution of the United States.

"It may be regarded as settled, that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government,"<sup>3</sup>—a judicial Opinion wherein search will in vain be made for any dissertations on either the personality, or the sovereignties, of the principal federal executive..

<sup>1</sup> Venable, Partition of Powers;  
Am. Bar Assoc'n Rep., 1885, p. 236.

<sup>2</sup> *Id.* p. 237.  
<sup>3</sup> 195 U. S. 140.

Here, then, was the first apportionment of the sovereignty of a State of the Union, viz.: as between it and the general government. "It would have been superfluous to confer any power on the States, because they retain all powers not actually taken from them." <sup>1</sup>

"While Congress is everywhere the supreme legislative power for some subjects, the tariff, for instance, or copyright, or interstate commerce, the Legislature of each State is, within that State, supreme for other subjects, the law of marriage, for instance, or of sale, or of police administration." <sup>2</sup> That the United States Constitution effected an apportionment of the sovereignty as between each State and the general government, in contradistinction from an extinguishment of State sovereignty, was explicitly declared by the tenth amendment, which provided that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." Yet, in face of what foregoes, the acute foreign observer, already cited, pronounced in favor of the theory "that every State, on entering the Union, finally renounced its sovereignty, *and* is now forever subject to the federal authority as defined by the Constitution." <sup>3</sup> Yes and no; the former as to the latter proposition, and the latter as to the former. The same author wrote, later: "The earlier states-

<sup>1</sup> Bryce, *Am. Commonwealth*, p. 313.

<sup>2</sup> Bryce, *Stúd. Hist. & Jurisp.*, p. 53.

<sup>3</sup> *Am. Commonwealth*, p. 313.

men, such as Hamilton and Madison, held that sovereignty was, by the Constitution, divided between the Nation, acting through Congress and the President and the States"; but "the southerners, led by Calhoun, insisted that it remained in the several States, suspended or temporarily qualified, but capable of resuming its former proportions in each State, whenever that State should quit the Union."<sup>1</sup> And his conclusion is that the knot, which the law could not untie, was "cut by the sword," when the War of 1861-65 decided against the southern theory of resumability.

It is unnecessary to do more than point out the distinction between a contest over the question of revocability of a State's delegation of a part of its sovereignty for federative purposes, and one over the question whether the State sovereignty, under the federal compact, was "finally renounced," and the only sovereignty thereafter discoverable was and is to be found in the general government. The second clause of the Sixth Article of the United States Constitution, indeed, provides that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land "; but this supremacy is in a limited sphere. That the United States general government is one of delegated powers, is elementary in American public law. And "this government is acknowledged by all to be one of enumerated

<sup>1</sup> Stud. Hist. & Jurisp., p. 105.

powers. The principle that it can exercise only the powers granted to it . . . is now universally admitted.”<sup>1</sup> Where a delegation of power is not universal, the postulate of sovereignty,—which is the same word as supremacy,—is, logically and rationally, limited by the terms of the instrument of delegation. “A perusal of the Constitution, along with the first ten amendments, should satisfy anyone that the system is based on the fundamental idea that political sovereignty, or the right to govern, is capable of division, according to subjects and powers.”<sup>2</sup> “If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action.”<sup>3</sup>

Less excuse need be offered for tarrying on this fundamental thesis—that each of the States of the Union on the one hand, and the general government on the other, are sovereign in their respective spheres—because of the obvious call for a caution when the matter of the apportionment of the *federal* sovereignty comes under consideration, seeing that the fund is finite, not to make unqualified, exclusive, plenary and unlimited drafts on it in favor of a single one of three constitutional distributees.

It being “settled that the Constitution of the

<sup>1</sup> Per MARSHALL, Ch. J., in *McCulloch v. State of Maryland*, 4 Wheat., on p. 405.

<sup>2</sup> Curtis, Const. Hist. of U. S., vol. 2, p. 2.

<sup>3</sup> Per MARSHALL, Ch. J., in *McCulloch v. State of Maryland*, *ubi supra*.



United States is the only source of power authorizing action by any branch of the federal government,"<sup>1</sup> resort is to be had to that instrument, alone, to ascertain (1) what part of their sovereignty the people, in each of eleven States, in 1789, recalled from their local agent, the State, and caused to be vested in the general government; and (2) whether any, and, if any, what apportionment as to manner of exercise of this delegated sovereignty was effected among the branches of the federal or national government.

Any Sibylline ambiguities or Cimmerian obscurities with which that child of wisdom and compromise was swaddled were torn away by the strong hand of a Marshall, who subjected its clauses to the established canons of interpretation, while the indissoluble perpetuity of the Union was, later, thundered to the world by the cannon which grew silent at Appomattox.

The *modus* of distribution, by the United States Constitution, of the supreme power between the States, respectively, and the national government, has been analyzed and summarized in a work already cited:<sup>2</sup>

(A) Certain power is conferred on the national government. (B) Certain restrictions are imposed on the States. Under the former head—(1) vested in the general government, *alone*, are those divisions of the supreme power which pertain to the conduct of foreign relations, the army, navy, interstate com-

<sup>1</sup> *Dorr v. U. S.*, 195 U. S. 140, <sup>2</sup> Bryce, *Am. Commonwealth*, *supra* (1903). vol. I, p. 313 *et seq.*

merce, currency, weights and measures, and the post office; all other divisions of the supreme power relating to internal government remaining in the States; (2) exercisable by the general government and the States, concurrently, are power to legislate on bankruptcy and certain commercial matters, such as pilot laws, but so as that State legislation takes effect only in the absence of federal; also, power to tax, judicial power in certain cases of diverse citizenship and power to determine as to the election of members of Congress. The foregoing enumeration, which is a mere synopsis of the provisions of the Constitution and its amendments, will be sufficient as a preliminary to the main subject.

That the will of the sovereign be declared, interpreted (including judicial application to specific cases), and executed, appears to exhaust the conceivable categories of political activity in government—*i. e.*, the exercise of legislative, judicial and executive power.<sup>1</sup>

In harmony with this axiom is the structure of the United States Constitution, which consists, substantially, of three articles, respectively entitled, (Art. 1) Of the Legislature; (Art. 2) Of the Executive; (Art. 3) Of the Judiciary; with some ancillary and miscellaneous provisions. No Delphic dubiety enshrouds the enquiry where the demigods of '89 lodged the exercise of the power to *declare* the people's federal will. "All legislative powers herein granted shall be vested in a congress of the

<sup>1</sup> See 7 Pet. 546.

United States. . . .”<sup>1</sup> Equally unambiguous is the designation of the agency entrusted with the function of *interpreting* (and *applying*) the declared will of the people. “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time order and establish. . . .”<sup>2</sup> “The Constitution vests *the whole* judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish.”<sup>3</sup> Finally, as to *executing* the declared will of the people: “The executive power shall be vested in a president of the United States of America. . . .”<sup>4</sup> It may be remarked, in passing, that the insertion, in the executive article, after the words “the United States,” of the words “of America,” which are lacking in Art. 1 (Of the Legislature), was not, in my opinion, intended to provide for any cerebral expansion of the executive over Congress or the Caribbean.

“All legislative powers,” and “the whole judicial power,” of the federal government being by the Constitution vested in Congress and the federal courts, respectively, unless there be a *quantum quid*, among theoretic governmental activities there would seem to spring a corollary, that *nothing is left*, to be apportioned to the office modeled after the English King, except the executive power.

<sup>1</sup> Art. 1.

*bury v. Madison*, 1 Cranch, on

<sup>2</sup> U. S. Const., Art. 3, § 1, 1.

p. 173.

<sup>3</sup> Per MARSHALL, Ch. J., in *Mar-*

<sup>4</sup> U. S. Const., Art. 2, § 1, 1.

Thus, at the threshold of an investigation of the proper conception of the office of president, were it asked: Who hath fixed its bounds? Who hath said, thus far and no farther, and here shall thy proud waves be stayed, etc., etc., etc.? The answer would seem to be: The people hath done all this, in and by the Constitution of the United States of (North) America, by creating *an executive* office.

It is true that the language of Article 1 of the Constitution is, that "all legislative powers *herein granted*" are vested in Congress; but since by the tenth amendment, as already remarked, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, there is slender support for any little theory of a subsidiary legislation-mill, fed by the executive hopper.

Fairness, indeed, compels the admission that "or," here, has been asserted to be a mere *alias* ("at another time,")<sup>1</sup> though, so far as known, nobody has yet had the temerity to suggest that it is an *alibi* ("in another place"; *se eadem die fuisse alibi*).<sup>2</sup> In order to demolish the former contention, it suffices to point to the significant circumstance that the tenth amendment is silent! (—whether that passive attribute befell this portion of the Constitution as an accompaniment of the overwhelming popular voice in 1904, need not now be argued—); a conclusion which relegates the entire dogma of reserved powers to the limbo of

<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> *Ibid.*

the academicians. And in the *Munn* case Chief Justice WAITE says that, "when it was found necessary to establish a national government for national purposes a part of the powers of the States, and of the people of the States, was granted to the United States and the people of the United States";<sup>1</sup> which shows that the States, and the people of the States, are not synonymous, and rescues this venerable constitutional provision from the stigma of tautological nonsense.

Again: in *McCulloch v. State of Maryland*,<sup>2</sup> MARSHALL, Ch. J., refers to a proposal, of counsel for Maryland, "to consider that instrument" (the Constitution) "not as emanating from the people, but as the act of sovereign and independent States, in the following words:

"It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligations or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and, by the Convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted on it in the only manner in which they can act safely, effect-

<sup>1</sup> 94 U. S. 124.

<sup>2</sup> 4 Wheat. 316 (1819).

ively and wisely, on such a subject, by assembling in convention. It is true they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments. From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people."<sup>1</sup>

From the foregoing deliverance of the great constitutional expositor, certain inferences, it is submitted are beyond cavil, viz.: (1) In the genesis of the Constitution, the States, and the people of the States, were not synonymous; (2) the Constitution was ordained and established by the people of the States—the people of each State speaking through a convention assembled within its own territory; (3) the people of the States, acting, it is true, in unison, yet in their several separate States, being they who ordained and established the Constitution, are "the people," to whom and by whom were reserved, by the tenth amendment, those powers (a) "not delegated to the United States by the Constitution," nor (b) "reserved to the States, respectively."

<sup>1</sup> Page 403.

Therefore he who would annihilate the "people of the States" as being identical with "the States," and pictures a grand electorate of 80,000,000 (excluding women, children and Indians not taxed), running the circus under the management of an incarnation of nationality,—with Congress and the Supreme Court outside the tent, and the Constitution hanging over the rope, is, in the opinion of the great chief justice, a wild political dreamer.

To return to the function of this article: Is there, or is there not, a subtle fallacy in the reasoning thus far indulged,—that the people, in creating a federative government, following the "natural distribution" of the supreme power, viz.: "into legislative, executive and judicial,"<sup>1</sup> and apportioning all the legislative power to Congress, and the whole judicial power to the courts, had nothing but executive power left for the presidential office?

There is a weighty, though not federal, authority which may be deemed relevant, by analogy, to this inquiry, consisting of an Opinion of the highest court of New York: "Under our" (N. Y.) "Constitution, the executive power of the State *answers to that of the king*, and devolves upon the governor during the term for which he is elected. The legislative power is vested in the Senate and Assembly, which take the place of Parliament, and the judicial power in the courts established in accordance with the provisions of the Constitution. The three great branches of government are separate and distinct, but are co-equal and co-ordinate; their pow-

<sup>1</sup> 7 Pet. 546.

ers have been carefully apportioned; one makes the laws, another construes and adjudges as to the rights of persons to life, liberty and property thereunder, and the third executes the laws enacted and the judgments decreed.”<sup>1</sup>

It may possibly be complained that this analysis tends to support, rather than subvert, the reasoning now subjected to scrutiny. But it must be admitted that, in the same Opinion, the court afterwards *held*: “as we have seen, the power of the king” (evidently the English king) “has been divided”;<sup>2</sup> which is a reminder that we are dealing with the prerogatives of the Norman and Plantagenet—not to mention the Tudor, the Stuart and the Hanoverian—rulers, and, multiplication by division being a familiar phenomenon in biology, it is incumbent to tread with circumspection, and “to resort to all the lights of contemporary history.”<sup>3</sup>

The *exercise* of powers being a fair criterion of the possession of them, resort may be had to a historic document, signed by several persons, July, 1776, containing a specification under twenty-seven heads of the exercise of certain powers by the third member of the last-named dynasty, which, though such exercise caused unpleasantness at the time, and eventually led to a serious political rupture, undeniably merit the epithets of unqualified, exclusive, plenary and unlimited, if not benign; the question, how such of those powers as survive have been “divided” among the people’s depositaries, coming

<sup>1</sup> 156 N. Y. 144 (1898).

<sup>2</sup> 16 Pet. 610.

<sup>3</sup> *Id.* p. 145.



in, also, for incidental consideration in a discovery of the extent of the federal, executive *jus coronæ*.<sup>1</sup>

In fine, in view of the difficulties experienced in apprehending, historically and rationally, what powers, other than executive, inhere in the executive office created by the United States Constitution, *it will now be assumed*—an assumption being always valid, *causa argumenti*—that, by an analysis of the prerogatives of the Norman and Plantagenet rulers, the President of the United States may be said to retain the executive *and magisterial* functions, discarding those only that are royal and hereditary. If this be criticised as a violent assumption it is to be remembered that the present is an age of evolution, perchance enfolding, in its inner recesses, an era of executive expansion; and only the timorous and the weakling will fear to walk the path indicated by the modern logic when lighted by the torch of contemporary history (including popular elections) in quest of a proper construction of the Constitution of the United States.

The enquirer should not falter, even when recalling the words of Jefferson: "The tyranny of the executive will come in its turn," nor recoil from the duty of according a candid response to the momentous *quæres*: Is Jefferson's prophecy now being fulfilled? Is this the age of executive usurpation?

The point I emphasize at present is, is the President of the United States *a magistrate*, in addition

<sup>1</sup> 94 U. S. 124.

to being an executive? What is a magistrate? To ascertain this, I claim the right, judicially established,<sup>1</sup> "to look into the dictionary for the meaning of words." The history of the utterances of the priestly office, indeed, records unnumbered supplications from the sacred desk, imploring the benediction of a higher power on "our chief magistrate, and all who are in authority,"—an argument convincing within the limits of its potency. But secular definitions may be preferred by the exacting.

"Magistrate. A public civil officer invested with some part of the legislative, executive or judicial power given by the Constitution. In a narrower sense this term includes only inferior judicial officers, as justices of the *peace*."<sup>2</sup> A question as to the meaning of "magistrate" came before the Supreme Judicial Court of the Commonwealth of Massachusetts, in the earlier part of the last preceding century, in the leading case of *Scanlan v. Wright*, where the learned Chief Justice *held*: "It is difficult to fix any definite meaning to the word 'magistrate,' a generic term importing a public officer exercising a public authority; it was intended, we think, to use a term sufficiently broad to indicate a class of officers exercising an authority similar to that of justices of the *peace*."<sup>3</sup> From this collation of authorities it may be gathered that the significance and value of the term range between the extremes of (1) a generic term (*nomen*:

<sup>1</sup> 116 U. S. 654.

<sup>3</sup> 13 Pick. 523, 528.

<sup>2</sup> Bouv. Law Dict.

*generalissimum*)—any public officer invested with some part of the power given by the Constitution—and (2) an inferior judicial officer, honored in contemporary and ancient history, as *conservator pacis regis*.<sup>1</sup>

The latter interpretation being inadmissible in its bearing on the present inquiry, both upon the ground that the office was inferior, and that it was distinctively destitute of the war-power, the only alternative is the acceptance of a *mere genus*. Now, the overwhelming *consensus* of opinion as to the issue of the mediæval war between the two opposing classes of schoolmen known, respectively, as Nominalists and Realists, is that the former were in the right, namely, in contending that there is *no real thing* corresponding to a “genus.” Not until the latter is clothed with the “*differentia*,” giving rise to the dignity of “species,” are we confronted by a physically and legally recognizable entity.<sup>2</sup> In short, a generic term is *nothing at all!* Hence, by virtue of the retention of the *magisterial* functions of the Plantagenet and Norman rulers, all American governors, senators, judges, president and Sultan of Sulu enjoy, in common, a mild pre-eminence which no thoughtful and benevolent mind will begrudge them.

Though the search for grounds of the aggrandizement of the principal federal executive office, along the lines of magisterial majesty, has thus proved unfruitful, it is manifestly only prudent, and a duty, to look further into contemporary history for light

<sup>1</sup> 1 Blacks. Com. 349.

<sup>2</sup> Kant, Prolegom.

on the motives which actuated the people of the several States in replacing the Confederation by the Union.

That the purpose of the Constitution was to remedy the defects of the Confederation, no one will be found to dispute. What were the great defects of the Confederation? Probably Hamilton knew if anyone did; and, scanning the pages of the *Federalist*, the following enumeration is discovered:

"The great and radical vice in the construction of the existing Confederation is in the principle of legislation for States or governments in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist."<sup>1</sup> "We must extend the authority of the Union to the persons of the citizens—the only proper objects of government."<sup>2</sup> "The next most palpable defect of the Confederation is the total want of a sanction to its laws."<sup>3</sup> "The want of a mutual guaranty of the State governments is another capital imperfection in the federal plan."<sup>4</sup> "The principle of regulating the contributions of the States to the common treasury, by *quotas* is another fundamental error in the Confederation."<sup>5</sup> "In addition to the defects already enumerated in the existing federal system, there are others of not less importance which concur in rendering it altogether unfit for the administration of the affairs of the Union."<sup>6</sup> "The right of equal suffrage among the

<sup>1</sup> Fed., No. 15.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.* No. 21.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id.* No. 22.

States is another exceptional part of the Confederation.”<sup>1</sup> “A circumstance which *crowns the defects* of the Confederation remains yet to be mentioned—the want of a judiciary power.”<sup>2</sup> “In this review of the Confederation I have confined myself to the exhibition of its most material defects, passing over those imperfections in its details by which even a great part of the power intended to be conferred upon it has been in a great measure rendered abortive. It must be, by this time, evident to all men of reflection who can divest themselves of the prepossessions of preconceived opinions, that it is a system so radically vicious as to admit not of amendment but by an entire change in its leading features and characters.”<sup>3</sup>

He who in the foregoing masterly and authoritative exposition of the defects of the Confederation describes a lament over the lack of executive jiu-jitsu, as the great defect, may be thought to lie under an unqualified, not necessarily a deliberate, mistake.

Assuming, therefore, now, that the presidential office is an executive one, as the people of the States seemed to think when they created it, it remains to be considered whether it be true that the vast, undeveloped and even unexplored domains of its authority afford illimitable opportunities for expansion? And, if not, why not?

In the first place, viewing the office in its actual exercise in contemporaneous and other history, can there, or can there not, be detected something arti-

<sup>1</sup> *Ibid.*<sup>2</sup> *Ibid.*<sup>3</sup> *Ibid.*

ficial in the perfect symmetry of the much-vaunted division of all governmental powers into legislative, judicial and executive, and the rigid exclusion of the functionary or functionaries in each department (subject only to the minor device of the famous American "checks and balances"), from the province of each of the others?

The elementary student, in like manner as he learns of the procrustean division of the entire human race into "savage, barbarous, civilized and enlightened," is instructed that, under the system first perfected by the demigods of '89, the legislature makes a law, the judiciary construes it, and the executive enforces it; but what are the notable facts, in the spheres of State and federal activity, alike? Passing by the whimsical implication, in this early lesson, that legislation is never comprehensible until explained or construed by a subsequent process, is it not now universally recognized, not only that the courts are continuously engaged in the process of judicial legislation, but that this process is, in the main, beneficent, and the chief cause and source of the vitality, flexibility and healthy growth of the law? Apart from this, it is further known that construction of the enactments of the legislative body is a minor item in the activities of the judiciary, who, besides being constantly busied with the construction, also, of their own legislation, exercise their chief function in applying legal rules to the exigencies of particular, ever-varying groups of facts, involving the life, liberty or property of the individual suitors.

Finally, and which is more to the point, THE VAST BULK OF THE EXECUTION OF THE LAW IS EFFECTED THROUGH THE AGENCY OF SUBORDINATE ADMINISTRATIVE OFFICERS, AND ESPECIALLY THE MINISTERIAL OFFICERS OF THE COURTS.

These patent and undeniable facts in our governmental systems strip the executive office, proper, of the chief part of the theoretic functions indicated by its title, and exploited in State papers. So true is this, that the sporadic instances where the chief federal executive has had occasion literally to intervene for the execution of the laws, as in threatening the South Carolina nullifiers with execution, or ordering United States troops to expedite the mails past Debs, stand out as landmarks in political history, and excited, at the time, vehement controversy as to the validity of the interpositions.

In the throes of a nation's agony, an immortal Lincoln, brushing aside even the Constitution, summoned to the execution of the highest law—the preservation of a nation's being—the first cohorts of a host of martyrs whose myriad graves are yet moistened with the tears, and will ever be crowned by the love, of a grateful people.

But the rarity of such exigencies induces the submission that even the term “executive,” in its application to the American system of government, is largely a specimen of inexact nomenclature. A governor (*gubernator*) may be said—borrowing a novel metaphor—to belong at the helm of the ship of State; but the progress of the latter bears a re-

semblance to that of the elongated, rectangular craft which traverses our inland waterways rather than to that of the battleship, whose workmen wrought her ribs of steel, ploughing the vasty deep, in search of an unwilling foe. And, should Palinurus nod, wearied by sitting in an alien chair, at worst the nozzle bumps unharmed against the berme bank.

A president, in the halcyon days of peace which are prevailingly dominant in a powerful commonwealth, presides—at functions and over the personal fortunes of half a million office-holders; which occupations, by direct information, take the most of the time. The monotony of recessional routine may, though rarely, be varied by the grief occasioned by witnessing the summary disintegration of a weak, sister republic; or, during the *briefest recess*, a call may arise for dexterity, owing to the rapid flight of time, in effecting a promotion or two which, *ex vi termini*, can have no sinister portent. But occasions inevitably supervene when a physical and nervous necessity demands a vent for the automatic initiative by way of a referendum to the Colorado *felidæ*, or a pursuit of the bear through the wind-falls of the Rockies.

Upon a close view, the attributes, or passive sovereignties of the office, appear more obtrusively than the powers. The normal term of office is only four years,—a feature of the Constitution which Hamilton and Madison cited, to reassure those who feared that an office modeled after the English king would enable the incumbent to entrench himself



among the vast, illimitable domains of unexplored and undeveloped powers,—and if by reason of strength it be four more, yet there is the labor and sorrow of moving, and the pensive anticipation of eventual, unstrenuous, innocuous desuetude.

Over against these drawbacks, however, stands the fact that the executive alone is subject to a constitutional mandate to take oath that he will *execute his office*. An express constitutional obligation being equivalent to an express grant of power to discharge it, he, accordingly, is able to swear, and so stands unique in history. The better opinion is that this does not compel him to do execution on the office, in the sense of a painful operation sometimes devolving on sheriffs, but, rather, simply to do his duty. Such an obligation was inculcated on the English navy, at Trafalgar, by the last signal from the battleship "Victory," and has since been recognized as binding on all officeholders, and those awaiting office, of all the degrees, throughout the civilized world. To a brilliant author, writing in 1835, who viewed American institutions with a lover's eye, is due the paradox that the strength of the federal executive lay in his weakness.

"In America, the president cannot prevent any law from being passed, nor can he evade the obligation of enforcing it. His sincere and zealous co-operation is no doubt useful, but it is not indispensable in the carrying on of public affairs. All his important acts are directly or indirectly submitted to the Legislature; and where he is independent of it he can do but little. It is, therefore,

his weakness, and not his power, which enables him to remain in opposition to Congress.”<sup>1</sup>

But, has not the executive office EVOLVED?

*The evolution of the President.* To ascertain this there is only one source of information, the Constitution itself.<sup>2</sup> Bryce, writing in 1888, said:

“As no bills are submitted by the president, and as, even were he to submit them, no one of his ministers sits in either house to explain and defend them, *the message is a shot in the air* without practical result. It is rather a manifesto, or declaration of opinion and policy, than a step towards legislation. Congress is not moved: members go their own ways and bring in their own bills. . . . In quiet times the power of the president is not great. He is hampered at every turn by the necessity of humoring his party. He is so much engrossed by the trivial and mechanical parts of his work as to have little leisure for framing large schemes of policy, while in carrying them out he needs the co-operation of Congress, which may be jealous, or indifferent, or hostile. He has less influence on legislation,—that is to say, his individual volition makes less difference to the course legislation takes than the speaker of the house of representatives. . . . The dignity and power of the president have, except as respects the increase in the quantity of his patronage, grown but little during the last fifty years. . . . Here, too, one sees how

<sup>1</sup> De Tocqueville, *Democracy in America*, p. 132.

<sup>2</sup> 195 U. S. 140.

a rigid or supreme Constitution serves to *keep things as they were.*"<sup>1</sup>

A duty enjoined on the president by the Constitution, immemorially honored in the observance, is, to "give to Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient."<sup>2</sup> At the present day, a punctilious compliance with the former branch of this requirement is of minor importance, as intelligent persons who read the newspapers are informed of events bearing on the state of the Union, and other places, about contemporaneously with their occurrence. As regards the recommendations, their effectiveness, especially since the overwhelming popular election of 1904, may afford an approximate criterion of the advance of the active powers of the office, under the influence of evolution. A list of the recommendations to the fifty-eighth congress, and their outgo, at the short, final session of 1904-05, has been taken from a leading daily:

### *Recommendations to Congress.*

(1) Introductory caution against extravagance in appropriations.—The total of authorized expenditures will increase the treasury deficit.<sup>3</sup>

(2) Employers' liability law.—Bill failed.

<sup>1</sup> Am. Commonwealth, 3d ed., mated revenues for next year, 58, 65, 66. \$725,590,515, from the total of

<sup>2</sup> Const., art. 2, § 3, 1.

<sup>3</sup> This year Mr. Livingston, of Georgia, subtracting the esti- appropriations, \$818,478,914, obtained a difference of \$92,888,399.

(3) Strengthening of the safety-appliance act.—No action.

(4) Railroad rate legislation.—Bill failed.

(5) Legislation, better to control insurance companies.—Nothing done.

(6) Legislation creating a system of small parks for the city of Washington.—Nothing done.

(7) Law to consolidate forest work in the department of agriculture.—Nothing done.

(8) Two bills to quarantine diseased cattle and to prevent interstate commerce in such animals.—Nothing done.

(9) Authority, to president, to set apart certain lands for game preserves.—Denied.

(10) Reorganization of the consular service and the substitution of salaries for fees.—Nothing done.

(11) National gallery of art created.—Nothing done.

(12) National quarantine law.—Nothing done.

(13) Currency legislation.—Not discussed.

(14) Legislation for encouraging the merchant marine.—Nothing done.

(15) Legislation to give the United States better facilities for reaching the oriental markets.—Nothing done.

(16) Amendments to the naturalization and immigration laws.—Nothing done.

(17) An act concerning citizenship.—Nothing done.

(18) Enactment for the protection of elections.—Nothing done.

(19) Legislation to expedite criminal prosecutions.—Nothing done.

(20) Acts for the benefit of Alaska, especially that this territory be allowed a delegate in congress.—Not taken up.

(21) Ten general arbitration treaties.—Pigeon-holed.

(22) Law to protect Americans abroad.—Not considered.

(23) Material increase of the navy.—Two ships.

(24) That a system of floating mines be provided for harbor defense.—Not discussed.

(25) Medals of honor for commissioned and warrant officers in the navy.—Refused.

(26) Whipping post for wife-beaters in the District of Columbia.—Advocated by a bachelor member of the house.

(27) Law to prevent the smoke nuisance in the city of Washington, the official washing having been ruined.—Pocket-vetoed.

(28) Ratification of the Hay-Bond treaty, establishing reciprocity between the United States and Newfoundland.—Nothing accomplished.

(29) Treaty with San Domingo.—Postponed.

(30) Reduction of number of Isthmian canal commission, and form of government for zone.—No bill passed.

(31) Legislation to prevent the transmission of insect pests through the mails.—Failed.

(32) A Philippine tariff.—A bill passed.

Why await the Crumpacker, or Sherman, or

Platt, or any other bill (*e. g.*, Nye)? They are dead. Buried in No. 58.

Let the craven, palpitating over the question: Is Jefferson's prophecy being fulfilled? take heart. The legislature yet exercises the inherent powers with which it has been invested by the people. Not in vain did our forebears, in a sturdy struggle of the centuries, portrayed by Hallam, immortalized by Runnymede, wrest the power of the purse from Plantagenet and Tudor kings, and hand it over to the commons. America's Representatives inherit the trust. Ship-money, from Hampden, until and including to-day, is granted *gratia* the bi-cameral body carrying on business under and by virtue of the first article of the United States Constitution. Where the money-bags are untied, there are the eagles. Still is it true that "the question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the people of the United States."<sup>1</sup> The people of the States are not yet committed to the policy of amending or even abrogating their Constitution by the obscure and indefinite means of a popular, constitutional election of their servants.

"The three great branches of government are separate and distinct, but are co-equal and co-ordinate; their powers have been carefully apportioned; one makes the laws; another construes and adjudges as to the rights of persons to life, liberty and property thereunder, and the third *executes the*

<sup>1</sup> Per MARSHALL, Ch. J., in *Marbury v. Madison*, 1 Cranch, 137, 176 (1803).

*laws* and the judgments decreed.”<sup>1</sup> “The truth is, that the legislative power is the great and overruling power in every free government.”<sup>2</sup> “The executive is, in civilized countries, itself the creature of the law, deriving therefrom its existence, as well as its authority”<sup>3</sup>—that is my perception of the Union, founded by Washington, worshipped by Webster, and saved BY THE ARMIES OF THE PEOPLE OF THE STATES! The heroism of Valley Forge, the sacrifice of Gettysburg, have not been effaced by the masquerade at El Caney, or the tale of the tubs in the Orient. The blood of the martyrs is the seed of freedom. A reawaking consciousness will see to it, that a government of the people, by the people and for the people shall not perish from off the face of the earth.

An executive, albeit of majestic figure, incar-

<sup>1</sup> *People ex rel. v. Morton, ubi supra.* “When the decision of the United States Supreme Court was handed down in the Michigan tax case the following paragraph appeared in the opinion, which was written by Justice BREWER: ‘In the nation no one of the three great departments can assume or be given the functions of another, for the Constitution distinctly grants to the President, Congress and the Judiciary separately the executive, legislative and judicial powers of the nation. It may therefore be conceded that an attempted delegation by Congress to the President or any ministerial officer or board of power to fix a rate of taxation or exercise other legislative function would be judged unconstitutional. But does it follow that a State is subject to the same restraint?’ This *obiter dictum* was construed by many as referring to the rate legislation now pending before Congress. When Justice BREWER learned from the newspapers that the paragraph was under discussion and had been so interpreted he carefully erased it from the decision of the court in order to avoid any appearance whatever of giving advice to Congress.”—*New York World*, April 6, 1906.

<sup>2</sup> Story on the Constitution, § 533.

<sup>3</sup> Bryce, *American Commonwealth*, 215.

nation of executive expansion, uncontrolled by Congress, unrestrained by the courts, executing statutes, though the courts declare them unconstitutional and forbid him to execute them, refusing to execute statutes that the courts declare constitutional and command him to execute, invested with all the attributes of sovereignty—that is my conception of Abyssinia or anarchy!

An executive who should behave that way would likely have some prior or subsequent arrangements with the 79,999,999 citizens who have not offered him the American crown.

The prophecy of Jefferson will be fulfilled in that late age when the future antiquarian, in latitude 40° 42' 43" N., longitude 74° 0' 3" W., delving deep in the lava bed of Storm King, turned volcano, shall lift, from her crumbling, upstretched arm, the lightless torch of the Statue of Liberty.

*"You carry Cæsar."*

PLUT.



### III.

#### **"ENUMERATED MOTIONS"—A CURIOSITY OF LEGAL LITERATURE.**

"Enumerated motions" are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the Code, agreed cases submitted under section 1279 of the Code, and appeals from final orders and decrees of surrogates' courts, and matters provided for by sections 2085-2099 and 2138 of the Code.

"Non-enumerated motions include all other questions submitted to the court, and shall be heard at Special Term except when otherwise directed by law." <sup>1</sup>

When the student, who has familiarized himself with the 3,441 sections of the New York Code of Civil Procedure, has taken up the General Rules of Practice, and reached Rule 38, he cannot fail to be puzzled by questions which naturally arise on a perusal of the two sentences above quoted. Not having met with the term, "enumerated motion," between the covers of the Code, the inference is inevitable that a subject is here introduced which is exclusively

<sup>1</sup> N. Y. General rule of Practice, 38, 1st and 2d sentences.

governed by the judicial rules. The meaning of the word "enumerated" as applied to a motion, invites inquiry. It would seem, that the very act of specifying a number of different sorts of motions, *i. e.*, enumerating them, would cause them to be possessed of the accident described by this epithet. But, as the supposition that the use of the adjective "enumerated," and the division of all "questions submitted to the court" into enumerated and non-enumerated motions, are without meaning or purpose cannot be entertained, the theory suggests itself, that "enumerated" is here used in a technical sense not at first sight apparent, and particularly, that the two-fold division is made for the purpose of conciseness of reference to the respective classes, in subsequent provisions, to be encountered in the rules, prescribing modes of practice in connection with them, respectively.

The two only proper meanings of "enumerate" are (1) to ascertain the number of; and (2) to specify *seriatim*. But neither of these definitions appears to be applicable on condition of reaching an intelligible interpretation of the rule. Moreover, when a search is made in the rules, for subsequent references to the two classes of motions here created, the references found are not always consistent with the two sentences above quoted from Rule 38. Rule 39 speaks of "enumerated appeals" and of "appeals in non-enumerated motions." Rule 41 mentions "appeals from non-enumerated motions" twice. Rule 42 refers to enumerated and non-enumerated "cases." Rule 44

specifies, in association, "non-enumerated motions" and "appeals from orders." And Rule 47 contains a similar allusion.

After a perusal of all the rules, therefore, the subject remains surrounded with a degree of obscurity, and the chief question, prompted by a rational curiosity,—why the words "enumerated" and "non-enumerated" were chosen for the purpose for which they are employed in Rule 38, or in other words, what the significance of those adjectives, as there used, is,—remains unanswered.

It is believed that this question can be solved by a reference to history.

At the January term, in the year 1799, of the Supreme Court of the State of New York, that court, which then consisted of a chief justice and four puisne justices, established a number of rules, including the two following:

"Ordered.

"1. That the following enumerated motions, to wit, all motions to bring on to be argued a question arising on special verdict, case reserved at the trial, case agreed between the parties without trial, demurrer to evidence or pleadings, writ of error or writ in the nature of a writ of error, comprehending the writ of mandamus, and all motions to set aside non-suit, verdict, inquisition or report, otherwise than for irregularity only, shall be heard according to the priority of the time when the question arose; the evidence of which when two or more causes shall be moved in, before leave granted in any one of

them to be heard, shall be a note thereof in writing signed by the attorney in the cause.

"2. That with respect to all other motions the motion first made shall be first heard, and they shall have preference to the enumerated motions; but if, there not being any non-enumerated motion about to be heard, the court shall proceed to hear an enumerated motion, then all the non-enumerated motions shall lose their preference for the day."

The accidental circumstance that the former Supreme Court, at this remote date, used the common but grammatically inaccurate expression, "the following enumerated motions, to wit," just as one would say "the following named persons," or "the following described property," instead of the expression, "the motions enumerated as follows, to wit," has had the curious result of creating, and, for more than a century perpetuating, the chief puzzle encountered by the student of to-day, on reading Rule No. 38 of the General Rules of Practice.

The situation, at present, is the same as if the Supreme Court, in 1799, had ordered that "the following described motions shall be heard" in a certain order (enumerating them), and the present rule said: "Described motions are motions arising on special verdict," etc., and, "non-described motions include all other questions," etc.

That the foregoing explanation is the correct one appears from the authority of a cotemporary. CAINES, in his Practice,<sup>1</sup> says:

<sup>1</sup> 1808, A. D.

"Of the kinds of motions. These are divided into two: (1) enumerated and non-enumerated motions. They are thus denominated from either being *specified in the rule referred to* (1st rule, January, 1799), or not specified. Those specified are named enumerated, those not specified are termed non-enumerated." <sup>1</sup>

DUNLAP, in his Practice,<sup>2</sup> gave a different explanation, which was obviously erroneous, as follows:

Enumerated motions "are so called because they are entered and numbered or enumerated upon the calendar or docket of the court, and are regularly to be heard according to the order of that enumeration." <sup>3</sup>

The learned author ran into the fallacy of putting cause for effect. The clerk put the motions in question on a calendar, in the prescribed order, according to information derived from the "note" (of issue) signed by the attorney, as a necessary means of giving effect to Rule 1, declaring that they should be heard in that order. It is clearly not the case, that the judges referred to certain motions, as to which they were then engaged in making a new and original rule, for the order of hearing, by a designation which could only be derived from the fact that the clerk would necessarily, in future, place these motions on a numbered calendar, in order to bring the rule into operation. A conclusive reason why the explanation now criticised must be rejected is, that it is inconsistent with Rule 2 of 1799. For, assuming the word

<sup>1</sup> Page 38.

<sup>2</sup> 1821, A. D.

<sup>3</sup> Page 324.

"enumerated," in Rule 1, to be used as an absolute term (*i. e.*, not merely indicating the act of enumeration which immediately follows), the opening words of Rule 1, would mean, "the following members of the class known as enumerated motions," with a necessary implication that other members of that same class were excluded from the operation of that rule. This would cause the words, "all other motions," in Rule 2, to include all non-enumerated motions, and such enumerated motions as do not fall within Rule 1. But, in the clause, "they shall have preference to the enumerated motions," occurring in Rule 2, the word "they" is clearly incapable of including enumerated motions; for if it did, the clause would provide for a preference of enumerated motions to enumerated motions *as such*.

Having shown, as it is supposed, that the words, "enumerated" and "non-enumerated," in the present General Rule 38, are not only quite destitute of intrinsic significance, but affirmatively misleading, or at least puzzling, by their meaninglessness, and that the items in the first sentence of that rule might just as well (nay, better) have been collectively called "class 1," or by any other name, and the items in the second sentence of the same rule have been collectively called "class 2," etc., and the said items have been severally referred to, in the subsequent rules, by the same designations, it may be not uninteresting to inquire as to the exact manner in which this anomaly arose.

The phraseology of Rule 2, itself, rendered likely

an unconscious severing of the word "enumerated," from its relations to the specification which immediately followed it, in Rule 1, and its use in a manner implying that it was a known term of absolute description. For Rule 2, instead of using such an expression as "any motion *not* enumerated in the last preceding sentence," spoke of "any *non-enumerated* motion."

At any rate, whether for this or another reason, forthwith after the promulgation of the rule, court and counsel began to busy themselves with profound inquiries and astute decisions, as to whether various motions not actually within the enumeration made in Rule 1, should be treated in the same manner; and this took the form of a decision in each case, that the motion in question was, or was not, an "enumerated motion."

The following were held to be "non-enumerated motions: " Motion in arrest of judgment;<sup>1</sup> to set aside verdict for irregular conduct of jury;<sup>2</sup> trial by record;<sup>3</sup> and the following to be "enumerated motions," though not within the enumeration of the rule: Motion for judgment on frivolous demurrer;<sup>4</sup> for new trial on ground of newly discovered evidence;<sup>5</sup> to set aside referee's report for irregularity, and on the merits;<sup>6</sup> same as to verdict;<sup>7</sup> to set aside referee's report on the merits.<sup>8</sup>

<sup>1</sup> Hough v. Stover, 2 Cai. 221.

<sup>2</sup> Smith v. Cheetham, *id.* p. 81.

<sup>3</sup> McKenzie v. Wilson, *id.* 385.

<sup>4</sup> McCabe v. McKay, *id.* 100.

<sup>5</sup> Chandler v. Trayard, *id.* 94.

<sup>6</sup> Remsen v. Isaacs, 1 Cai. 22.

<sup>7</sup> Foden v. Sharp, 4 Johns. 183.

<sup>8</sup> Clinton v. Elmendorf, 3 Johns.

On Saturday, February 18, 1809, the Supreme Court formally issued an order to the effect that "motions in arrest of judgment be hereafter brought on as belonging to the class of enumerated motions."<sup>1</sup> So handy did the adventitious adjective prove, that the Supreme Court came to speak of a "non-enumerated day."<sup>2</sup>

With such a judicial and professional send-off, at the beginning of the century, little wonder that these boon companions, the "enumerated" and "non-enumerated," have come sailing down the years unwrecked, and to-day nod to us, out of the fog, with beaming and innocuous vacuity!

In 1852, a motion for a new trial, on a case or bill of exceptions, was *held* to be an "enumerated or calendar motion;"<sup>3</sup> and the same explanatory phraseology was used in *Van Schaick v. Winne*.<sup>4</sup> In *Empire Asso. v. Stevens*,<sup>5</sup> a motion to confirm report of a referee, appointed by interlocutory judgment in equity, was held to be enumerated; and a like ruling was made with respect to an appeal from an order of a county court, granting a new trial on the minutes.<sup>6</sup> And even a judge of the Court of Appeals is heard declaring that a plaintiff had no right "to call upon the court by a non-enumerated motion," at Special Term, to grant judgment on an answer, as insufficient.<sup>7</sup>

Whatever entertainment may be afforded by a

<sup>1</sup> 4 Johns. 192.

<sup>2</sup> 2 Cai. 259.

<sup>3</sup> *Ellsworth v. Gooding*, 8 How. [N. S.] 186.

Pr. 1.

<sup>4</sup> *Id.* p. 8.

<sup>5</sup> 8 Hun 15.

<sup>6</sup> *Harper v. Allyn*, 3 Abb.

[N. S.] 186.

<sup>7</sup> *Peo. v. N. R. R. Co.*, 42 N. Y.

233; dissent.



bit of antiquarian research into the source of an existing anomaly in judicial terminology, a more solid interest attaches itself of course, to a consideration of the substance and purpose of the "order" of 1799, and those of its modern descendants.

The ancient, and the corresponding modern, rules are essentially and exclusively calendar regulations, providing, namely, for the modes of approaching the actual presence of the court, in the various cases specified. The two rules of 1799 accomplished three effects: (1) the more important steps in a litigation, involving such approach and application for some judicial action, were specified *seriatim*; (2) an order of priority for the hearing of these applications was prescribed,—a necessity thus arising that they be placed upon a calendar in that order, though not necessarily numbered; and (3) all other applications to the court were directed to be heard in an order depending on the success of the respective counsel in catching the eye of the court.

Looking into the details of the first rule of 1799, it may be noted that a "special verdict" survives to this day. "A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts, to the court."<sup>1</sup> "A special verdict is one by which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon."<sup>2</sup> The special verdict was not drawn up in form, at the trial; it was the duty of the plaintiff's attorney to

<sup>1</sup> Dunlap, *Prac.* 664.

<sup>2</sup> Code Civ. Proc. § 1186.

have it drawn up, settled and entered on the record. By it the jury stated the naked facts, as they found them to be proved, and prayed the advice of the court thereon; concluding conditionally that if, upon the whole, the court should be of opinion that the plaintiff had a cause of action they then find for the plaintiff, and assess his damages at so much; if otherwise, then for the defendant.<sup>1</sup> The hearing before the court, on the question of law involved, was one of the so-called "enumerated motions."

A "case reserved at the trial" meant a case arising by reason of a point reserved by the court at the trial. It was explained thus: If the judge, at *nisi prius*, reserved for the decision of the court, a point made on motion to him against the plaintiff's right to recover, the Supreme Court, on the question being brought before it, on a "case" made, might render judgment of non-suit, if the decision were against the plaintiff's right.<sup>2</sup>

A demurrer to evidence was a proceeding by which the judges, whose province it is to answer all questions of law, were called upon to declare what the law was upon the facts shown in evidence, in analogy to the demurrer upon facts alleged in pleading. The demurrant was bound to admit, as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence might legally tend to prove. The most usual course, where there was a demurrer

<sup>1</sup> Dunlap, Prac. 665.

<sup>2</sup> Dunlap, Prac. 655; Putnam v. Wyley, 8 Johns. 432, 436.

to evidence, was to discharge the jury without further inquiry.<sup>1</sup>

A "writ of error" was the representative of the modern appeal.

Coming, now, to the modern rules, it may be remarked that the predecessor, under the Code of Procedure,<sup>2</sup> of the present Rule 38 read as follows:

"Enumerated motions are motions arising on special verdict; issues of law; cases; exceptions; appeals from orders sustaining or overruling demurrers; appeals from an inferior court; and appeals by virtue of section 348 of the Code. Non-enumerated motions include all other questions submitted to the court, and shall be heard at Special Term, except when otherwise directed by law."<sup>3</sup>

Looking into the details of the present Rule 38, it may be noted that the word, "motion," is there used in the general sense of a "question submitted to the court"<sup>4</sup> in actual session. A motion, generally considered, may be described as an application to the court, to make some order, pass judgment or sentence, or take other judicial action.<sup>5</sup>

The Code of Civil Procedure does not define a "motion," though it declares that an application for an order is a motion.<sup>6</sup> A "motion for judgment" is expressly recognized.<sup>7</sup> Keeping in mind the general conception of a "motion" dissipates any surprise occasionable by the clubbing together, in Rule 38, of so heterogeneous an assemblage as "is-

<sup>1</sup> Dunlap, Prac. 647-649.

<sup>2</sup> Of 1848, 1849.

<sup>3</sup> Rule 40, of 1858; 1st and 2d sentences.

<sup>4</sup> See *id.* 2d sentence.

<sup>5</sup> See Abb. Law Dict., *sub. tit.*

<sup>6</sup> § 768.

<sup>7</sup> *Id.* §§ 1233, 1234.

sues of law," "cases," "exceptions," "appeals," and even "matters," under this one head. It may be stated that all the "motions," of Rule 38, are either applications for an order, or applications for a judgment; a Case being a motion only in the sense that a party attempts to *move* the court to grant him some relief, by an appeal (or by an application for a new trial) based on a Case, and a like remark being applicable to "exceptions"; an issue of law, a motion, only in the sense that a party attempts to move the court to determine the issue—brings the demurrer to a hearing; and so, an "agreed case" is not a motion, though the application to the court, for judgment thereon, is. The various "appeals" need no comment. The clause, as to the "matters provided for by §§ 2085–2099 of the Code,"<sup>1</sup> is more obscure. Probably, all the "matters" enumerated between those limits are not motions, either enumerated or non-enumerated. The problem, where "motions" are encountered in those sections, can be solved by noting the junctures at which a party applies to the court, in actual session, for some relief. The "motion," in § 2138, is an application to the court for a final order upon a hearing, on a return to a writ of certiorari to review the determination of an inferior tribunal.

A glance at the court calendars, as printed in current numbers of the "New York Law Journal," which are made up in conformity to the General Rules of Practice, and so as to effectuate the local calendar rules in the first and second districts, will

<sup>1</sup> Mandamus and prohibition.

demonstrate that "non-enumerated," as applied to a "motion," does not mean "not numbered," and exposes the obscurity occasioned by using the term, "motion," at times in the general sense mentioned, and at others in what may be called the colloquial sense, in the rules and in the calendar make-up.

There will be found a reference to "original motions" in a notice from the Court of Appeals; "motions" and "non-enumerated motions" appear, each class in a numbered list, in one calendar of the Appellate Division; "litigated motions," duly numbered, but in fact non-enumerated, constitute the calendar of Special Term, Part I; "motions," so designated, and duly numbered, in fact including both "enumerated" and "non-enumerated,"<sup>1</sup> and "demurrers," also numbered, form part of the calendar of Special Term, Part III; and, in the Second Department, "enumerated day calendars" and "non-enumerated day calendars" each duly numbered, are in vogue.

Enumerated motions, when heard at the Appellate Division, require printing. Certain "enumerated motions," as motions on special verdict, demurrers, etc., are heard at the Special Term.<sup>2</sup> Non-enumerated motions, outside the first and second districts, are governed by General Rule 21.

Enough has been said to indicate the intricacy of the details of the calendar practice, so far as the distinctions among the varieties of "motions" are concerned, at least in the first and second judicial districts.

<sup>1</sup> See local rule 8.

<sup>2</sup> See General Rule 40.

The object aimed at, in the foregoing lines, will have been accomplished if the reader shall find in them suggestions, deemed worthy of approval, tending to explain the puzzle involved in the New York distinction between enumerated and non-enumerated motions, and to call attention to the two different senses in which the word "motion" appears to be employed in the calendar regulations.

*"In our proper motion, we ascend."*

MILT.

## IV.

### SUSPENSION OF THE POWER OF ALIENATION, UNDER THE "REAL PROPERTY LAW" OF NEW YORK.

Has the "Real Property Law" of 1896 changed the rule, restricting the lawful suspension of the absolute power of alienation of real property, existing before its passage?

For more than sixty years, commencing January 1, 1830, and ending October 1, 1896, the time limit, within which the absolute power of alienation could be lawfully suspended, depended upon three sections of the Revised Statutes of the former year, which sections remained, *verbatim*, as enacted, during that long period, and whose construction was established by judicial decisions in a vast array of litigations. Those sections read:

"§ 14. *Void future estates. Suspending power of alienation.*—Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed."<sup>1</sup>

"§ 15. *How long it may be suspended.*—The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer

<sup>1</sup> R. S. of 1830, part II, ch. 1, tit. 2, § 14.

period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section." <sup>1</sup>

"§ 16. *Contingent remainder in fee*.—A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age." <sup>2</sup>

The "Real Property Law," <sup>3</sup> enacted as reported by the Statutory Revision Commission, and which took effect October 1, 1896, expressly repealed those three sections,<sup>4</sup> and substituted for them a single section, which is next quoted, together with the commissioners' note thereto:

"§ 32. *Suspension of power of alienation*.—The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the

<sup>1</sup> *Id.* § 15.

<sup>2</sup> *Id.* § 16.

<sup>3</sup> L. 1896, ch. 547.

<sup>4</sup> See Session Laws, 1896, vol. 1, p. 623.



event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.<sup>1</sup>

*Commissioners' note to above.*—"R. S. 2432, pt. II, ch. 1, tit. 2, §§ 14, 15, 16, unchanged in substance, except that the last sentence, which is declaratory of existing law, is new. See *Lang v. Ropke*, 3 Sandf. 369."<sup>2</sup>

The case intended to be cited is 5 Sandford, 363.

Collating the foregoing three, now repealed, sections of the Revised Statutes of 1830, and their present, alleged substitute, it is seen, that the first sentence of the modern section is the second sentence of § 14 of the Revised Statutes, with the change of "such" to "the absolute"; that the second sentence of the modern section clubs together the first sentence of § 14, *the description constituting the middle portion of section 15*, and § 16, with the following changes: The excision of the latter half of the first sentence of § 14 ("for a longer period than is prescribed in this article"), the introduction of "that," after "except," in § 15, the omission of "shall," before "die," and of "their," before "full," and the transformation of

<sup>1</sup> L. 1896, ch. 547, being "Chapter XLVI of the General Laws," § 32.

<sup>2</sup> From Commissioners' Report to the Legislature, dated April 20, 1896, p. 525.

"upon," into "on," in § 16; and that the final sentence of the modern section, as already explained, is new. The exclusive retention of the middle portion of § 15 involved the expunging of the words, "The absolute power of alienation shall not be suspended," at its opening, and the omission of the formal words, "in the single case mentioned in the next section," at its close.

The net result, as to *quantity*, of this renovation of those three venerable sections is, singularly, discovered to be, the omission of thirty of the old, and the addition of thirty new, words, whereby the new enactment is rigidly confined to the verbal compass of one hundred and fifty-seven words—exactly the same number as comprised in the three original sections—the codification of *Lang v. Ropke* being thrown in, without any increase of bulk.

Passing from quantity to *quality*, the important fact appears, that, by the transformation, the substantive, independent, legislative declaration of the old law, that "the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than," etc., has totally disappeared—in effect § 15 of the Revised Statutes is *repealed without a substitute*. Thus, the present investigation assumes the form of a consideration of the *thesis*, that the section last named was unmeaning surplusage.

*A priori*, it is unlikely that the revisers of 1830 left their work marred by such a blemish as the presence of a section without purpose or meaning.

"In relation to article first of the second title of

chapter first of the second part of the Revised Statutes, the revisers inform the legislature that the provisions recommended by them are the result of much and attentive consideration, and are intended to 'extricate this branch of the law from the perplexity and obscurity in which it was involved, and render a system simple, uniform and intelligible, which was various, complicated and abstruse.' <sup>1</sup> The complicated character of the structure for which the revisers of 1830 were framing a substitute was, doubtless, an effective warning to them to report only such enactments as would occupy a clear and defined position in the new scheme. Concerning one of the branches of the law of real property, they observe: "The law of Powers, as all who have attempted to master it will readily admit, is probably the most intricate labyrinth in all our jurisprudence. Few, in the course of their studies, have been called to enter it who have not found it difficult to grope their way in its numerous and winding passages."<sup>2</sup> "Instead, therefore, of endeavoring to unravel the mysteries of Uses and Trusts, or to cast light into the numerous dark and winding passages of the labyrinth of Powers, they demolished the whole. The learned antiquarian will pause and ponder over this vast pile of ruins; venerable at least for their antiquity, the erection of which occupied centuries, and put in requisition the labors of kings, ecclesiastics and laymen. Upon the ruins

<sup>1</sup> *Coster v. Lorillard*, 14 Wend. 265, 298.

<sup>2</sup> Revisers' Notes to R. S., part II, ch. 1, tit. 2, art. 3; 5 Edm. Stat. 2d ed., 583.

have been erected new edifices—a new system of uses and trusts, apparently plain and intelligible and adapted to the real wants of society.”<sup>1</sup>

In two of the earliest cases in which the subject of perpetuities, as regulated by the Revised Statutes, came before the New York Court of Errors, § 15, above referred to, is shown to play an important rôle. Before adverting to those cases, a word may be not out of place on the subject of a certain classification of “estates,” established by the Revised Statutes of 1830. By the same title of those statutes, as that in which the foregoing §§ 14, 15 and 16 are found, estates in land, in respect of the time of their enjoyment, were divided into “estates in possession” and “estates in expectancy”;<sup>2</sup> and the latter were subdivided into “future estates” and “reversions.”<sup>3</sup> A *future estate* was defined as “an estate limited to commence in possession at a future day,”<sup>4</sup> and an *estate in expectancy*, elsewhere, called an “expectant estate,”<sup>5</sup> was declared to be “where the right to the possession is postponed to a future period.”<sup>6</sup> The expression, *present estate*, does not occur in the Revised Statutes of 1830, but, soon after their enactment, the courts began to speak of “present estates,” evidently referring to the revisers’ “estates in possession,” which were, by the Revised Statutes, declared to be “where the owner has an immediate right to the possession of

<sup>1</sup> *Coster v. Lorillard*, *supra*, on p. 314.

<sup>2</sup> § 7.

<sup>3</sup> § 9.

<sup>4</sup> § 10.

<sup>5</sup> §§ 32, 35.

<sup>6</sup> § 8.

the land.”<sup>1</sup> See 14 Wend.,<sup>2</sup> where it is said, of an immediate devise to trustees, for lives, that “the” (precedent) “estate in the trustee may be called a *present estate*”; and again,<sup>3</sup> where the court says: “At the death of the testator, the estate of the trustees vested immediately; that is, therefore, a *present estate*.”

The two early cases, above referred to, are *Coster v. Lorillard*,<sup>4</sup> and *Hawley v. James*.<sup>5</sup>

In *Coster v. Lorillard*, the facts were, that a testator devised land to trustees, in trust to receive the rents and profits for the benefit of *twelve* nephews and nieces, during their natural lives, with remainder to their descendants, in fee, the distribution among the remaindermen not to be made until the expiration of two years after the death of the last survivor of the nephews and nieces; and one of the questions decided was,<sup>6</sup> whether the devise of a *present estate*, to the trustees, suspended the absolute power of alienation beyond the statutory limit of “not more than *two* lives, in being at the creation of the estate.” It was *held*, that it did. SAVAGE, Ch. J., in his Opinion, said: “The fifteenth section declares that the absolute power of alienation shall not be suspended by any limitation or condition, whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate.”<sup>7</sup> The judicial reasoning

<sup>1</sup> § 8.

<sup>2</sup> On page 301.

<sup>3</sup> On page 303.

<sup>4</sup> 14 Wend. 265-399; A. D. 1835.

<sup>5</sup> 16 *id.* 61-235; A. D. 1836.

<sup>6</sup> See 14 Wend., p. 294.

<sup>7</sup> Page 302.

was, that, from the nature of the trust, the trustees were without power to convey (alien), and § 65 of the Revised Statutes declared a conveyance, by trustees, in contravention of the trust absolutely void.<sup>1</sup> The chief justice further observed: "The fifteenth section says: 'The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate.' The devise, in effect, says, that the power of alienation shall be suspended during the continuance of twelve lives in being at the creation of the estate, and for at least two years afterwards. There is a manifest repugnancy, and, at least, so much as is repugnant must be void."<sup>2</sup> NELSON, J., said: "The power of alienation was suspended for more than two lives in being, to wit, for twelve lives at the creation of the estate, and, therefore, a violation of the fifteenth section."<sup>3</sup> MAISON, Sen., said: "The legislature have expressly enacted,<sup>4</sup> that the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section, which does not reach this case. This estate is, therefore, in the manner it is sought by the will to be disposed of, perfectly and absolutely inalienable; the trusts cannot be carried into effect, unless

<sup>1</sup> Page 303.<sup>2</sup> Page 305.<sup>3</sup> Page 349.<sup>4</sup> R. S., p. 723, § 15.

the estate remains entire in the trustees until the death of the last survivor of the twelve nephews and nieces. The trust is, therefore, for this reason, in my judgment, not such an one as is authorized by the statute, and cannot prevail.”<sup>1</sup>

In *Hawley v. James*, the facts were, that a testator devised lands to trustees, in trust, to receive the rents and profits, and apply the same to the use of certain-named relatives, the final division of the estate being forbidden to take place, “until the youngest of my children and grandchildren, living at the date of this my will, and attaining the age of twenty-one years, shall have attained that age.” The number of such descendants of testator was thirteen; and the question was, whether this devise to trustees unduly suspended the absolute power of alienation. It was *held* that it did. NELSON, Ch. J., applied the same section which has just been referred to, saying: “The fifteenth section of the first article, 1 R. S. 723, gives the rule, which is as follows” (quoting the section).<sup>2</sup> BRONSON, J., said: “The case of *Coster v. Lorillard* has settled that the prohibition against suspending the absolute power of alienation, contained in the fifteenth section of the statute, applies as well to *present*, as to future estates,”<sup>3</sup> and: “As the power of alienation is suspended during the continuance of the trust, the next inquiry is whether the trust term is limited according to law. ‘The absolute power of alienation shall not be suspended by any condition or limitation

<sup>1</sup> Page 356.

<sup>3</sup> Page 163.

<sup>2</sup> See page 123.

whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate.' ”<sup>1</sup> And MAISON, Sen., said: “I feel satisfied, therefore, that the legislature . . . has left trusts of all descriptions, to receive rents and profits, under the salutary restrictions of the fifteenth section.”<sup>2</sup>

In 1864, the Court of Appeals said: “The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate ”<sup>3</sup> . . . The suspension, which it is the purpose of the statute to limit, may be effected by one of two methods, either by providing for the creation of future estates, to take effect upon the happening of some prospective event, the occurrence of which is essential to the vesting of such future estate, or by conveying to trustees upon some authorized trust.”<sup>4</sup>

“The absolute *ownership*” (of personal property) “is suspended in one of two ways, either by the creation of future estates vesting upon the occurrence of some future and contingent event, or by the creation of a trust which vests the estate in trustees.”<sup>5</sup>

It is settled law that the absolute ownership is

<sup>1</sup> § 15, p. 166.

<sup>2</sup> Page 266.

<sup>3</sup> 1 R. S. p. 723, § 15.

<sup>4</sup> Per DENIO, Ch. J., *Everitt v. Everitt*, 29 N. Y. 71, 72.

<sup>5</sup> Per FINCH, J., *Smith v. Edwards*, 88 N. Y. 102; A. D. 1882.

“The absolute ownership of *personal property* shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such



suspended in one of two ways, either by the creation of future estates vesting upon the occurrence of some future and contingent event, or by the creation of a trust which vests the estate in trustees."<sup>1</sup>

The number and fullness of the foregoing citations from decided cases may be explained by the care which has been taken to leave no doubt, from what precedes, of the soundness of the following submissions:

1. Under the Revised Statutes of 1830, the prohibition of the suspension of the absolute power of alienation of real property, by the creation of *future estates*, alone, was effected by the first sentence of § 14, above quoted; *i. e.*, that sentence applied *exclusively* to that class of estates.

2. Under the Revised Statutes of 1830, the only prohibition of the suspension of the absolute power of alienation of real property, by the creation of *present estates*, was the affirmative declaration, constituting § 15, viz.: The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except, etc.<sup>2</sup>

instrument be a will, for not more than two lives in being at the death of the testator. In all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act, in relation to future estates in lands." R. S. of 1830, part II, ch. 4, tit. 4, §§ 1, 2. Preserved by the Revision Commissioners of 1889; L. 1897, ch. 417, § 2.—"The Personal Property Law."

<sup>1</sup> *Steinway v. Steinway*, 163 N. Y. 194; A. D. 1900.

<sup>2</sup> This section, by its generality, was sufficiently broad to embrace both *present* and *future estates*, and, therefore, was cumulative, as to the latter class.

3. Section 15 has disappeared from the statute book, under the revision by the commission of 1889. Hence, at present, a trust, to receive and apply rents for twelve or a hundred lives, taking effect in possession immediately on creation, is not prohibited, but is valid.

This conclusion is in startling contrast to the commissioners' note, to the effect that the law, as reported by them, made no substantial change.

A practical inquiry, of interest to every owner of land in New York State, may be embodied in the historic form—What are you going to do about it?

An acute and learned writer, who has annotated the "Real Property Law" of 1896, is of the opinion, that the result of the recent revision ought not to be considered as instituting changes in the law, because the commissioners stated that they had made no substantial change, and for other reasons; the entire note of comment being as follows:

"The thirty-second section of the Law of Real Property . . . transposes sentences of the Revised Statutes and alters the language in some respects. The effect of those transpositions and alterations, it is thought, ought not to be considered as instituting changes in the law, for the commissioners of statutory revision expressly stated to the legislature that the Revised Statutes were thereby 'unchanged in substance, except that the last sentence, which is declaratory of existing law, is new.'<sup>1</sup> In view of this statement, and even of the apparent meaning of the new section, it would seem unde-

<sup>1</sup> See *Lang v. Ropke*, 3 Sand. 369.

sirable to regard the Revised Statutes as changed in any particular in so far as the lawful suspense of the power of alienation is concerned.<sup>1</sup> Section 32 then simply consolidated 1 Revised Statutes, 723, §§ 14, 15 and 16, and added a new sentence intended to be declaratory of pre-existing construction. There was no great harm in such consolidation as §§ 14 and 15 of the Revised Statutes were to be read together without consolidation. *Lorillard v. Coster*, 5 Paige, at pp. 189, 190."<sup>2</sup>

It is with deference, that the following comments, on the foregoing comment, are now made:

A statement, even express, of revision commissioners, to the effect that they have made no change in the pre-existing law, while entitled to respect, cannot avail to abrogate the settled canons of statutory construction; and where a feature of the revision has been to drop a substantive provision of a statute into the limbo of an express-repeal bag, without substitute, it is gone—until resurrected by its creator, the legislature. The "apparent meaning of the new section," which expressly declares the voidness of certain "future estates," and no others, is, that it has exclusive application to the class of estates so exclusively mentioned. Since Mr. Chaplin wrote in 1891, his view of the meaning of a statute of 1896 would imply a prescience attributable only to genius. The assertion, that "there was no great harm," in the consolidation,

<sup>1</sup> *Cf.* Chapl. "Express Trusts & Powers," § 386.

Property Law" (2d ed.) pp. 236, 237; A. D., 1904,

<sup>2</sup> Fowler, Annotation of "Real

is a "negative pregnant" with an admission that there was some harm—"a startling proposition, and one well calculated to fill the owners of" (real) "property with alarm";<sup>1</sup> for, once the foundations of real property are unsettled, you cannot, sometimes, know where you are at, until the end of years of litigation, when the final decision of a court of ultimate appeal adjudges and evinces the *quantum* of detriment. We come, finally, to the reasons why there was no great harm in the consolidation, viz.: that "§§ 14 and 15 of the Revised Statutes were to be read together without consolidation."<sup>2</sup>

Assuming that it had been *held*, in that case, that these two sections were to be read together, this might, indeed, be a good reason for putting them together in the revision, but would hardly seem to justify dropping one of the sections<sup>3</sup> altogether. On the contrary, such a decision may be said to be essentially condemnatory of such a course. But it is now in order, to note what was *decided* in and by the case cited from 5 Paige.

That was an appeal from the vice-chancellor of the first circuit, to the chancellor, and the reference above quoted, is to the Opinion of the vice-chancellor, given, in the volume mentioned, merely as part of the history of the case, and whose decision was *reversed* by the chancellor. The particular passage in the vice-chancellor's Opinion above cited<sup>4</sup> is as follows: "The courts . . . finally established

<sup>1</sup> 90 N. Y. 177.

<sup>2</sup> *Lorillard v. Coster*, 2 Paige, 189, 190.

<sup>3</sup> § 15.

<sup>4</sup> Pages 189, 190.

the well-known rule, allowing some latitude for the vesting of future estates. This rule came under consideration in the recent revision, and the revisers, adhering to the general plan of revising the laws by frequently embodying some portion of the common law into the statutes with more or less alterations, thought proper to do so with respect to this rule. The result is contained in the two next sections in order, viz.: the fourteenth and fifteenth; both of which, it will be seen, are necessary to make out the rule as now established, and for that purpose *they must be read together*. The fourteenth provides that 'every *future* estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this article.' It then proceeds: 'Such power of alienation is suspended when there are no persons in being by whom an *absolute fee in possession* can be conveyed.' These two sentences compose section 14; and we have thus far two things ascertained: First, the *effect* which an absolute suspension of the power of alienation beyond a certain period will produce; and second, what will *constitute* such a suspension. But one thing further is necessary, viz.: to prescribe the period beyond which there should be no such suspension; and this is done by the fifteenth section already quoted. It is obvious, therefore, that the fifteenth section was intended to carry out the provisions of the fourteenth, and that it was necessary for that purpose. Without it, the fourteenth would have been incomplete; but take the two together, and it is per-

ceived at once that they form an explicit enactment, *applicable, and only applicable to future estates*. They do not affect estates in possession. . . . It is still competent by deed, or will, to create an estate to take effect immediately in possession, in favor of any number of persons in being, as joint tenants for their lives, and for the life of the survivor; because, however numerous they may be, they have only all to unite with the remainderman or reversioner, and convey the whole estate in fee. The power of alienation, therefore, exists; nor is it suspended for a moment by the creation of such an estate. It is only suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."

It will be observed that the vice-chancellor, in the latter part of the foregoing quotation, referred to a *beneficial* conveyance or devise, and did not contemplate the case of the creation of a *trust* for lives, where the trustees were denied the power of alienation. It further appears, by the Opinion of the vice-chancellor, that the dogma—that §§ 14 and 15 were "to be read together"—was closely associated with the kindred proposition, that § 15 related only to *future* estates. The chancellor emphatically condemned the last-mentioned proposition, discoursed upon the question—how the vice-chancellor was "led into the error of supposing that the fifteenth section only related to future estates,"<sup>1</sup> and referred to "the provisions of the fifteenth section, as amended, being sufficiently

<sup>1</sup> 5 Paige, 222.

broad and extensive to embrace every kind of estate, either *present* or future, by which the power of alienation might be suspended beyond the prescribed period.”<sup>1</sup>

The cause went by appeal from Chancery to the Court of Errors, where it was entitled *Coster v. Lorillard*, and, in the highest court, the position of the vice-chancellor was unanimously overruled, as is shown by the foregoing quotations from the Opinions of the judges. Hence, it is immaterial, what judicial observations were recorded in “*Lorillard v. Coster*, 5 Paige, at pp. 189, 190.”

The situation to-day, then, appears to be that the revision of 1889-96 has blotted out the restriction on the suspension of the absolute power of alienation of real property, in cases where such suspension is produced by a conveyance or devise of a *present* estate, to trustees, without power to alien; and, accordingly, under the statute, on a plain reading, a trust to receive rents and apply them to the use of *any number* of persons, for their lives, is valid. In short, the Thellusson Will is resurrected and validated; and *Coster v. Lorillard* and *Hawley v. James*, are reversed by legislation.

Will the courts follow the statute, or the revision commissioners’ note—to the effect that they made no changes?

A circumstance, to which, so far as known, attention has not hitherto been called, viz.: that, during the sixty-six years during which the Revised Statutes of 1830 remained in force, an intrinsic absurd-

<sup>1</sup> Page 223.

ity in their wording did not interfere with their practical working, indicates the ability and disposition of the courts to adjudicate upon a statute upon an assumption that it says what it does not say.

The circumstance, referred to, is the *double comparative* in the phrase "shall not be suspended for a *longer* period than during the continuance of *not more than two* lives." The continuance of *one* life is "not more than" that of "two lives"; whence it follows, that the statute prohibits suspension for a longer period than during the continuance of one life. Not only so, but *no lives* are, emphatically, not more than two lives; hence the statute prohibited all suspension! The statute should have read "shall not be suspended for a longer period than during the continuance of two lives" (the words, "not more than," being omitted). But, unless the facts are misapprehended, the Revised Statutes were uniformly construed as if the law were correctly expressed.

The treatment of the new statute, in a recent decision of the highest court, throws even more light on the latest inquiry.

In *Wilbur v. Wilbur*,<sup>1</sup> the court seems to have taken the happy view of § 32, practically, apparently proceeding on the assumption that, inasmuch as the revision of 1896 "ought not" to have unsettled the foundations of real property rights, conveyances and devises, it has not done so. An extract from the Opinion in the case last above cited is as follows:

<sup>1</sup> 165 N. Y. 451, 456; A. D. 1901.



"The statute declares that the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed (Real Property Law, § 32). There are only two methods by which such a result can be accomplished: 1. By the creation of a trust which vests the estate in trustees. 2. By the creation of future estates vesting upon the occurrence of some future and contingent event. *Steinway v. Steinway*, 163 N. Y. 183."<sup>1</sup> "No trust was either created or attempted by those provisions, nor did they create a future estate to vest upon the occurrence of some future and contingent event."

The following is from the commissioners of 1889:

"We have, also, taken care not to make any changes in the phraseology of any statute that has been the subject of judicial decision, by which the construction thereof, as established by such decision, can be affected or impaired."<sup>2</sup>

"*Nihil . . . a me alienum.*"

TER.

<sup>1</sup> A case decided under the R. S. of 1830.

<sup>2</sup> From commissioners' preliminary note to the "Real Property Law" of 1896.

## V.

### NONSUITS, OLD AND NEW.

The ancient common-law Declaration, corresponding to the New York Complaint, in a civil action, after the title, date, venue, inducement, averments and counts, uniformly ended with the formula, "*et inde producit sectam, etc.*," Latin words properly meaning "and thereupon he (plaintiff) brings forward followers," *i. e.*, witnesses to vouch for the existence of at least a probable case, without which the law formerly would not put the defendant to the trouble of answering the charge.<sup>1</sup> Plaintiffs ceased, at an early day, to bring forward their suite of witnesses, but the final clause of the Declaration persisted, becoming, in translation, distorted to a degree singular even among the curiosities of legal phraseology, so as to read "and therefore he brings his suit," meaning "commences an action."<sup>2</sup>

This latter "suit" was, evidently, in the legal metaphor, a *pursuit* of the defendant, otherwise technically designated a "remedy." A negative derivative of the same word (*sequor*) from which *secta* was derived was drafted into service to convey the rule that, if plaintiff did not duly pursue his

<sup>1</sup> 3 Blacks. Comm. 295.

<sup>2</sup> See a Form of Declaration, in Stephen on Pleading, 34.

pursuit—follow his remedy—he was said to become “nonsuit”; *non sequitur clamorem suam*.

Thus, if a plaintiff neglected to deliver a declaration for two terms after defendant appeared, or was guilty of other delays or defaults against the rules of law in a subsequent stage of the action, he was adjudged not to pursue his remedy as he ought, and thereupon a “nonsuit” was entered.<sup>1</sup>

Custom has taken the “bring” (*produco*) of the common-law, severed it from the *secta* (followers) with which it had an indissoluble connection, and associated it with the “*actio*” of the civilians so firmly that it has come to seem, to the careless apprehension, that no verb other than “bring” could so appositely express the relation of a plaintiff to his *action* (“bring an action”). The primary step of the Roman, in legal pursuit of his adversary, was, indeed, to take him by the neck (*obtorto collo*) and *bring* or drag him to the seat of justice, but “when the *actor* and *reus* came before the praetor, then the actor did *actionem edere*”;<sup>2</sup> from which it appears that the aboriginal notion of the activity of a claimant, in respect of his *action*, was an issuance, or a giving forth.

The only “nonsuit,” if any, which can properly be said to survive in New York practice is that which may occur, in a jury case, at the trial. At a jury trial of old, it was usual, when a plaintiff perceived that he had “not given evidence sufficient to maintain his issue,” for him to withdraw himself, whereupon the action was ended. The reason of

<sup>1</sup> 3 Blacks. Comm. 295.

<sup>2</sup> Gilbert, Forum Romanum.

this practice was, that a *nonsuit* was more eligible for the plaintiff than an adverse verdict; "for, after a nonsuit, which was only a default, he might commence suit again for the same cause of action," whereas, after a verdict and judgment against him, he was forever barred from attacking the defendant upon the same ground of complaint.<sup>1</sup> Also, it was customary, when, during a trial the defendant, before the case was given to the jury, moved for a nonsuit, for the judge, if he was of opinion that plaintiff ought not to succeed, thereupon to direct the plaintiff to "be called"; who not appearing, a nonsuit followed.

COKE gives an explanation of the term, in commenting on § 208 of Littleton, where occur the words: "if the lord sueth a praecipe against his villeine, if he be nonsuite after appearance," etc., saying: "Be nonsuit," *id est, non est prosecutus breve suum*. For, by the law, the plaintiff is first agent at every continuance; and therefore the record sayeth "*quod petens seu querens* (naming them) *obtulit se*, who, if he be called, and make default, then he is said to be nonsuit. . . . He may commence an action of like nature, etc., againe. For it may be that he hath mistaken somewhat in that action, or was not provided of his proofes, or mistaking the day, or the like." <sup>2</sup>

In a case decided by the Court of Appeals in 1851, MULLETT, J., delivering the opinion, said: "The first point made by the appellants is, that the judge who presided at the trial erred in refus-

<sup>1</sup> 3 Blacks. Comm. 376.

<sup>2</sup> Co. Litt. 139a.

ing a nonsuit. According to the practice of the English courts a plaintiff cannot be nonsuited on the trial against his assent, but may insist on the cause going to the jury, and thus take his chance of a verdict.<sup>1</sup> With us, however, a plaintiff may be compelled to be nonsuited on the trial, when the evidence offered by him is clearly insufficient to support his action, there being then no question of fact to be decided by the jury. This power of the courts, to nonsuit the plaintiff, results from their being the judges of the law in the case, when no facts are in dispute. *Pratt v. Hall*, 13 Johns. 334."<sup>2</sup>

The statement, in the foregoing extract, that a plaintiff in the English courts could insist on the cause going to the jury, and thus take his chance of a verdict, coupled with the implication, in the concluding sentence, that the English courts were not the judges of the law in a case when no facts were in dispute, is so remarkable as to challenge an investigation of the question whether it was not erroneous.

1. The first proposition of the learned judge<sup>3</sup> is undeniably supported by the authority of GRAHAM, being, indeed, substantially a quotation from that author, omitting, however, the cautionary words, "it appears." The original reads: "According to the practice of the English courts it appears to be optional with the plaintiff whether

<sup>1</sup> *Grah. Prac.*, 2d. ed. 311, and the cases there cited.

<sup>2</sup> *Labar v. Koplin*, 4 N. Y. 547, 548.

<sup>3</sup> 4 N. Y. 548, *supra*.

he will be nonsuited or not, and he cannot be compelled to do so, but may insist upon the cause going to the jury, and thus take his chance of the verdict. 2 T. R. 275; 1 B. & Ald. 252; 9 Price, 291; 13 Price, 222; s. c., M'Clell., 69."<sup>1</sup>

2. CHITTY is even more definite and positive to the same effect: "A nonsuit must always be voluntary, *i. e.*, by the plaintiff's counsel submitting to the same or not appearing, and in no case can it be adverse or without implied consent. *Dewar v. Purday*, 4 Nev. & Man. 633."<sup>2</sup>

3. The cases cited by GRAHAM will now be examined in the order of their citation.

(a) *Watkins v. Towers*,<sup>3</sup> was an action of assumpsit in the Kings Bench, in 1788. The venue was changed from Middlesex to London, on defendant's application, but that rule was afterwards discharged on plaintiff's undertaking to give evidence of some matter in issue arising in Middlesex. On the trial plaintiff proved a rule of the court by which defendant paid money into court. Defendant's counsel objected that this was not a compliance with the undertaking, and, therefore, plaintiff ought to be nonsuited. But the trial judge was of opinion that plaintiff had fulfilled his engagement, and a verdict was afterwards given for plaintiff. Defendants obtained a rule to show cause why a nonsuit should not be entered, "but the court recommended to take a rule in the alternative, either for a new trial or a nonsuit." The two

<sup>1</sup> Grah. Prac. 311.

<sup>2</sup> 2 T. R. 275.

<sup>3</sup> Gen. Prac. vol. 3, pp. 910, 911.

grounds urged before the court *in banc*, in support of this rule were, first, that plaintiff had not complied with his undertaking because the evidence given was of a fact occurring after that undertaking had been given; and, second, that, if plaintiff failed in his undertaking, he ought to be nonsuited. ASHURST, J., and GROSE, J., wrote the Opinions. The former *held*, first, that plaintiff had fully complied with his undertaking, and, second, even if that could be doubted, "we ought not to grant a new trial," because to do so would "ultimately prove a nugatory act," since, on a second trial, plaintiff could give material evidence of other matters arising in Middlesex. GROSE, J., concurred in the first ruling of his brother, and then said: "It is not necessary to go into the other point, because the rule must be discharged on the first ground; if it were, I should think that we could not order a nonsuit to be entered against the consent of the plaintiff, but we might have granted a new trial on terms."

The last clause, above quoted from the opinion of GROSE, J., is evidently the only ground of Graham's citation of this case; and it is to be observed that the remark was clearly *obiter*; also that the question of the power of the court, *in banc*, to set aside a verdict which had been rendered for plaintiff, and order a nonsuit to be entered, is different from the question, which alone can arise in New York, whether a nonsuit can be ordered, *in invitum* plaintiff, at the trial.

(b) The following is the report, in full, of Min-

chin v. Clement:<sup>1</sup> "A rule having in this case been obtained in Michaelmas term, to set aside the verdict for the plaintiff and to enter a nonsuit or have a new trial, and the case now having been argued the court were clearly of opinion that the verdict ought to be set aside on the ground that the direction of the learned judge was wrong in point of law; but, inasmuch as no leave was given at the trial to enter a nonsuit, they were about to direct the rule to be drawn up for a new trial, but GASELEE contended that, inasmuch as the objection was made at the trial, and the court were now of opinion that such an objection was fatal to plaintiff's right of recovery, the defendant ought to have the benefit of a nonsuit at once, without going down to a second trial; and although he could not cite any case at that moment upon the subject, still he stated that he believed there were cases in which the judge had not reserved the point, and yet the court had directed a nonsuit to be entered. Lord ELLENBOROUGH, C. J.: 'It is in the plaintiff's option to be nonsuited or not; and if, at the trial, he had refused to be nonsuited, and the judge had then directed the jury to find a verdict against him, it was competent to the plaintiff to have tendered a bill of exceptions, of which advantage he would be deprived if the court were now to direct a nonsuit to be entered. We are, therefore, of opinion that the rule should be made absolute for a new trial only. Rule absolute.'"

The foregoing opinion of Lord ELLENBOROUGH

<sup>1</sup> 1 Barn. & Ald. 252; K. B. 1818.



shows that, so far is it from true that a plaintiff in the English courts can insist on the cause going to the jury and taking the chance of a verdict, the result of refusing to be nonsuited, where the trial judge was against him might be that the judge would direct the jury to render a verdict against him. It cannot be denied, that it is here stated, that a nonsuit is at plaintiff's option, and probably an option exercisable at the trial is referred to; but a doubt may be entertained whether this assertion of option was not *obiter*, seeing that a verdict had been rendered in favor of plaintiff, and the question now was whether the court *in banc* would order a nonsuit to be entered, as distinguished from granting a new trial; and this, too, where the trial judge had not given leave to move to enter a nonsuit—in other words, had not “reserved the point.”

(c) *Ward v. Mason*,<sup>1</sup> was assumpsit for use and occupation, tried at the Stafford Assizes in 1821. The material question at the trial was one of fact, namely, whether defendant, who had formerly occupied the premises, was still tenant, or another person had been accepted as tenant in discharge of defendant. Plaintiff was nonsuited at the trial, and a rule was obtained in the Exchequer to show cause why the nonsuit should not be set aside. The rule was made absolute, GARROW, B., saying: “I admit that where there is no question of law in the case a nonsuit cannot stand, if it should be arbitrarily directed; but how very many times have we all witnessed that, after a plaintiff's case has

<sup>1</sup> 9 Price, 201.

been gone through, the judge has suggested to his counsel that *he had better be called*. Sometimes it has happened, undoubtedly, that the plaintiff refuses to be nonsuited, and then the case goes to the jury with the disadvantage of the judge's decided opinion against the merits of it. That, however, did not take place in this case; but the judge having said that the plaintiff must be called, the counsel might in some way or other have intimated that they would prefer to take the chance of going to the jury." GRAHAM, B., said: "This is one of those mistakes into which we may any of us sometimes fall. The judge has certainly a *right to put a party out of court* wherever the case is once resolved into a pure question of law. On the other hand, it is the duty of the judge who tries the cause to leave the case, if it turns on a question of fact, to the jury. As to the acquiescence of the counsel in not interposing, I do not consider that binding on them. I take the distinction to be that where the counsel for the plaintiff asks to be nonsuited they cannot afterwards move to set it aside; but where the judge orders it *without their concurrence*, I think they are not precluded, although they do not object at the time." WOOD, B., said: "If the plaintiff chooses to submit to the opinion of the judge without letting the case go to the jury he certainly may do so, and that will be binding on him; but no man is obliged to submit to be nonsuited, on the opinion of the judge, *upon the weight or sufficiency of the evidence* which he brings forward to support his case. The judge may direct the jury

on it, according to the opinion which he may have formed; and if the jury adopt it, the party is concluded by their verdict; or, in order to avoid that, the party may submit to be nonsuited. In that case, most assuredly, he would not be permitted to move to set the nonsuit aside."

The doctrines implied in the Opinions in the foregoing case are clearly contradictory of an assertion that a plaintiff in the English courts could insist on the cause going to the jury, and take his chance of a verdict; and equally so of any such doctrine as that the court, in England, was not the judge of the law in a case, when no facts were in dispute.

It may be, that, in the assertion of Wood, B., that "no man is obliged to submit to be nonsuited, on the opinion of the judge, *upon the weight or sufficiency of the evidence* which he brings forward to support his case," a difference is indicated between the rule of law prevailing in England in 1821, and the rule in New York. In considering the question of the existence of such a difference, assuming that the law in New York never changes, reference may be had to a recent decision of the Court of Appeals, in which, although it concerned the power of a trial court to direct a verdict for defendant, the Opinion lays down in unmistakable terms the line of demarcation between the respective provinces of the court and the jury: "We think it cannot be correctly said, in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may

properly direct a verdict. So long as a question of fact exists it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it. But whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.”<sup>1</sup> These propositions do not seem to be distinguishable, in substance, from the doctrine stated in the second sentence of the Opinion of GRAHAM, B., in the foregoing case.

(d) *Elworthy v. Bird*,<sup>2</sup> was an action of assumpsit, in the Exchequer, in 1824. A rule had been obtained for setting aside a nonsuit directed at the trial and for a new trial, the judge having nonsuited the plaintiff on the ground that he could find nothing to leave to the jury in support of an action on the alleged agreement. The rule was discharged on the hearing, GARROW, B., saying: “In all cases where counsel do not *expressly* object to be nonsuited (and it is often a matter of grace to the plaintiff), I should consider it to be the nonsuit, not of the judge, but of the plaintiff’s own counsel, who are entitled, if they please, to elect to be nonsuited; and they are certainly the proper judges of what is most for the interest of their client.”

<sup>1</sup> *McDonald v. Met. St. Ry. Co.*,  
167 N. Y. 66.

<sup>2</sup> 13 Price, 222.

The foregoing case undeniably gives intimations of a doctrine of plaintiff's consent in connection with a nonsuit, but the point decided being that, where plaintiff did assent he could not afterwards move to set the nonsuit aside, the decision, on well-settled principles, was not an authority for Graham's assertion.

4. The case cited by CHITTY<sup>1</sup> might be considered as furnishing adequate ground for Chitty's assertion. For the reporter prefixes to the case the absolute statements: "The judge cannot, without the assent of the plaintiff, direct a nonsuit. In no case can a plaintiff be nonsuited against his will." The action was *Case*, in the King's Bench, in 1835, for infringing a musical copyright. At the close of plaintiff's evidence defendant's counsel applied for a nonsuit on the ground that there was no evidence to go to the jury in support of the statement, in the declaration, that plaintiff was the author of the music in question. The trial judge refused to stop the cause, but gave defendant leave to move to enter a nonsuit. The trial proceeding, *conflicting evidence* was given as to whether the music had been recently composed or was an old air revived; the jury failed to agree; and the judge, in the absence of plaintiff's counsel, directed that plaintiff be nonsuited. A rule *nisi* having been obtained, the rule was made absolute, DENMAN, C. J., saying it was perfectly clear that "when the plaintiff is required to be nonsuited it is at his option to appear or not to appear, and he may, if he pleases,

<sup>1</sup> *Dewar v. Purday*, 4 Nev. & Man. 633.

dispute what is then going forward"; that what took place on the first day of the trial was "the ordinary mode in which, by the general understanding of all parties, a plaintiff must be taken to agree to be bound by the future opinion which the *court* (who are placed in the situation of the *judge* at the trial) may afterwards form on the evidence then before the jury; and most undoubtedly the plaintiff has a right to say, at the trial: 'the consent that I give, to be so bound, is a consent having relation to the state in which I now stand, and on condition that the case is now proceeded with. If the learned judge, at the trial, thinks fit to proceed with the case I have no objection to submit to the nonsuit in the event of its afterwards appearing to the *court* that the objection taken ought to prevail.' And he has the right to reserve to himself, subject to that contingency, the chance of the verdict to which the jury may come. It seems to me that, in this case, what took place on the second day deprived the plaintiff of that chance, and that therefore he is entitled now to be placed in the same situation as if even the conditional consent not to appear had never been given."

And COLERIDGE, J., said: "I am quite of the same opinion. The only question in my mind was whether what had passed on the first day of the trial was by consent of the plaintiff. I now think that it was by his consent, and that it was a conditional consent; and that if the condition was not complied with, then he stood on his common-law right. His common-law right was to have the ver-

dict of the jury on the facts, and, if he pleased, the opinion of the judge expressly on the law of the case, so that he might take it to another tribunal if he thought fit. He waives that benefit by a conditional consent, and that condition is not complied with. Rule absolute."

It is to be noted that the foregoing was a case where the trial judge considered that there was conflicting evidence which plaintiff was entitled to have the jury consider, so that it lends no countenance to the doctrine that the English courts are not the judges of the law in the case when no facts are in dispute. Moreover, the nonsuit was granted, after the jury had announced their inability to agree, as a "smaller evil" than discharging them "without consent of the parties"; so that the decision is hardly an authority for or against the right of the court to take the case away from the jury entirely at the trial.

If the foregoing review of authorities be deemed to leave in doubt the question of the soundness of the statements of Graham and Chitty, it is to be remembered that, on the other hand, authorities are found which appear to be quite antagonistic to those statements.

TIDD, the first edition of whose practice appeared in 1796, expresses himself in a manner not altogether consistent with Chitty's statement that a nonsuit was always voluntary on the part of plaintiff. He says: "when the jury have agreed, they return to the bar; but before they gave their verdict it was formerly usual to call or demand the

plaintiff, in order to answer to the amercement to which by the old law he was liable, in case he failed in his suit; and it is now usual to call him whenever he is unable to make out his case either by reason of his not adducing evidence in support of it, or evidence arising in the proper county. And if it be clear that, in point of law, the action will not lie, the judge at *nisi prius* will nonsuit the plaintiff, although the objection appear on the record. . . . But where the case turns on a question of fact it ought to be submitted to the jury, unless the plaintiff's counsel expressly assent to his being nonsuited, a mere tacit acquiescence not being, *it seems*, sufficient." <sup>1</sup>

In an action in the King's Bench, 1786, to recover for goods sold, etc., BULLER, J., at the trial, was of the opinion that the goods in question having been supplied for the use of government, and defendant not having personally undertaken to pay, "the plaintiff ought to be nonsuited." "But the plaintiff's counsel appearing for their client when he was called, he left the question to the jury, telling them that they were bound to find for the defendant, in point of law." <sup>2</sup>

Here it is clear that the plaintiff's refusal of the grace of a nonsuit did not leave him the advantage of taking the chance of a verdict.

In an action in the Common Pleas in 1778, after a verdict for plaintiff below, defendant moved before the court, *in banc*, for a nonsuit to be entered

<sup>1</sup> 2 Prac. 867.

<sup>2</sup> *Macbeath v. Haldimand*, 1 T. R. 172, 175.



and a new trial. But "GOULD, BLACKSTONE and NARES, JJ., thought it impossible to order a nonsuit to be entered (unless by consent) after the plaintiff had appeared and a verdict had been taken." <sup>1</sup>

In an action in King's Bench in 1808, Lord ELLENBOROUGH, at *nisi prius*, considering that an action had been prematurely brought, as matter of law, called and nonsuited plaintiff against the "strenuous objection" of his counsel, saying: "In many (other) cases, when it is clear the action will not lie, although the objection appears on the record and might be taken advantage of by motion in arrest of judgment or by writ of error, judges are in the habit of directing a nonsuit." A rule to show cause why the nonsuit should not be set aside was discharged *in banc*.<sup>2</sup>

In an action in King's Bench, in 1786, on a policy of insurance, where a verdict had been rendered in favor of plaintiff, a motion was made by defendant for a new trial on the ground that the verdict was against the evidence, and ASHURST, J., said: "In this case, if the defendant had not paid money into court the plaintiffs must have been nonsuited."<sup>3</sup>

In an action for malicious prosecution, in King's Bench, in 1827, defendant called one witness, who was unimpeached and uncontradicted, and testified to facts showing the existence of "probable cause." "The counsel for the plaintiff

<sup>1</sup> Aylett v. Lowe, 2 Blacks. 1221, 1222.

<sup>2</sup> Sadler v. Robins, 1 Campb. 253, 256.

<sup>3</sup> Cox v. Parry, 1 T. R. 464, 465.

then *insisted* that it ought to be left to the jury to find whether they believed Stainer's evidence. The learned judge said that there was no contradictory evidence, . . . and he refused to leave any question to the jury, and nonsuited the plaintiff." A rule *nisi* was obtained for setting aside the nonsuit upon the ground that it ought to have been left to the jury to decide whether they believed this witness's testimony or not. Plaintiff's counsel argued that "the learned judge ought to have told the jury that if they believed the facts sworn to by Stainer, in his opinion there was probable cause for preferring the indictment, and that there ought to be a verdict for the defendant. Instead of that he entirely withdrew the case from the consideration of the jury, whereby the plaintiff's counsel was deprived of the opportunity of remarking on the demeanor of the witness and the consistency of his evidence." ABBOTT, C. J., said: "I think that the nonsuit in this case was proper. . . . Where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a judge is not bound to leave his credit to the jury, but to act upon them accordingly." And BAYLEY, J., said: "If there is nothing in the demeanor of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have

been bound to send the case down to a new trial." Rule discharged.<sup>1</sup>

It is submitted, upon the foregoing view of the authorities, that the statements in Graham and Chitty, and in *Labar v. Koplin*,<sup>2</sup> were misleading as to the then prevailing practice in the English courts in the matter of granting or refusing a nonsuit at *nisi prius*. That a plaintiff, in those courts, had not a universal and unqualified right to insist on a cause going to the jury and taking his chance of a verdict can probably not be doubted. The whole tenor and history of the English judicial law is against such a proposition.

The most marked feature of the old English "nonsuit" was that it left the way open for plaintiff thereafter to commence a new action for the same cause.<sup>3</sup>

COKE, indeed, adds, to his statement of the general rule, to this effect: "but yet for some special reasons nonsuit in some actions is peremptory," giving a number of instances which, however, are not of modern interest.<sup>4</sup>

The form of the judgment of nonsuit, or "*non pros.*," was, that plaintiff take nothing by his writ or precept.

*"Judicium in non pros. ss. Ideo consideratum est quod praedictus querens nill capiat per billam suam praedictam sed quod ipse et plegii sui de proseguendo, scilicet Jo. Doe et Ric. Ro., pro falso clamore suo, sint*

<sup>1</sup> *Davis v. Hardy*, 6 Barn. & Cresw. 225.

<sup>2</sup> N. Y. *supra*.

<sup>3</sup> See Blacks. Comm. and Co. Litt., *supra*.

<sup>4</sup> Co. Litt., 139 a, b.

*inde in misericordia. Et praedictus defendens eat inde sine die, etc. Et ulterius consideratum est,*" etc.<sup>1</sup>

Nonsuits came from over England to the State of New York with the rest of the common law, and cut no small figure in the judicial rules and decisions, and, of course, in the text-books of practice, in the days before the Code of Procedure.<sup>2</sup>

In the great reform of judicial procedure effected in New York in 1848, 1849, the name at least of "nonsuit" disappeared, along with the names and existence of "original writs," "declarations," "bills," "feigned issues" and many mesne writs, the word "nonsuit" not occurring in the Code of Procedure of either of the years specified.

The universal first pleading became the "complaint,"—not even "bill of complaint"—and where a plaintiff was required to be merely put out of court, as, *e. g.*, in an action before a justice of the peace, when, from plaintiff's own showing, the title to real property was in question, the statute directed the justice, in plain English, to "dismiss the action."<sup>3</sup>

The mingling of old and new terms, so likely to arise, where a partial reform is engrafted upon a venerable though decaying stock, now manifested itself. Section 470 of the Code of 1849 required the judges of the Supreme Court to meet at Albany, in August of that year, and make rules to carry the "Code" into effect. Accordingly, those judges met

<sup>1</sup> *Liber Placitandi* "Thompson's Caine's Prac. 516; Dunlap's Prac. Entries," 451; London, 1674. 423.

<sup>2</sup> See Supreme Court Rules, 1799; <sup>3</sup> Co. Proc., § 59.

and framed ninety-two " Rules of the Supreme Court," taking effect September 1, 1849, the notes to which showed that these new rules were largely adaptations of the one hundred and forty-eight Rules of the Supreme Court, "in equity," and of the one hundred and three Rules of the same court, "at law," of the year 1847, both of the last-named sets of rules having been adopted under the then recent Constitution of 1846.

In these new code rules of 1849, the motion for "judgment in case of nonsuit," of Rule 41 of 1847, for not duly bringing a cause to trial, became a motion for "the dismissal of the complaint";<sup>1</sup> Rule 46, at law, of 1847, providing that "it shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict, and the plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict," was reproduced *verbatim* in Rule 26 of 1849; and Rule 115, in equity, of 1847, to the effect that on a bill for divorce, etc., if plaintiff did not duly file a replication to an answer of denial the defendant might apply to have the bill dismissed, was changed so as to provide, in the like case, that defendant might "apply to have the complaint dismissed."<sup>2</sup>

The reform Code of 1849 was thus launched on its adventurous voyage, under the commendable commission "to simplify and abridge the practice, pleadings and proceedings of the courts of this State," being furnished, in lieu of the nonsuits, dis-

<sup>1</sup> Rule 23.

<sup>2</sup> Rule 71, of 1849.

continuances, *retraxits*, and dismissals of bill, of the old practice, with nonsuits, dismissal of complaint, and dismissal of action; the latter tackle and apparel suffering the disadvantage of having to await the evolution of the one hundred and two volumes of Abbott's and Howard's practice reports, for a determination of their natures and effect under the novel conditions.

In the first installment of the Code of Civil Procedure, enacted in 1876, which was accompanied with a repealer of the main bulk of the Code of Procedure of 1849, the word "nonsuit" occurred only once, namely, in § 1182, which was the 38th Rule of the Supreme Court (of 1874) bodily imported into the statute, providing that a plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict. In general, the Code of 1876 agreed with the former Code in phraseology, referring to a "dismissal of the complaint" eight times,<sup>1</sup> "abatement of action" seven times,<sup>2</sup> "discontinuance of action" five times,<sup>3</sup> and "dismissal of the action" once.<sup>4</sup>

On the completion, in 1880, of the Code of Civil Procedure by the addition of nine chapters,<sup>5</sup> the word "nonsuit" was conspicuous by its absence from the portions of the new statute relating to courts of record; which, however, contained provisions relating to "dismissal of complaint,"<sup>6</sup> "dis-

<sup>1</sup> §§ 405, 412, 461, 821, 822, 980, 1209, 1428.

<sup>2</sup> §§ 44, 412, 585, 755, 761, 764, 1674.

<sup>3</sup> §§ 44, 412 580, 680, 1428.

<sup>4</sup> § 265, *subd.* 3.

<sup>5</sup> §§ 1496-3356.

<sup>6</sup> §§ 1533, 1634, 1640.

continuance of action,"<sup>1</sup> and "abatement of action."<sup>2</sup> But the word "nonsuit" appeared in the part relating to justices' courts; occurring, namely, without definition, in §§ 3007, 3013 and 3015; this part also containing provisions relating to "dismissal of complaint,"<sup>3</sup> "discontinuance of action,"<sup>4</sup> "judgment of discontinuance,"<sup>5</sup> and "withdrawal of action,"<sup>6</sup> possibly allied to the old *retraxit*."

The introduction of the word "nonsuit" into § 1182 of the Code of Civil Procedure, was due to the fact that it had traveled down the years in the Supreme Court rules, and the Commissioners saw some reason for making it a part of the statute. The introduction of the same word into the part of the "nine chapters" relating to justices of the peace, in 1880, was due to mere inertia, the provisions containing it being reproductions of portions of the Revised Statutes of 1830, under which *nonsuits* in these inferior courts were rife.

In considering the situation of to-day, in respect of nonsuits at trials, attention will be directed, in order, to the Code, to the Rules, to the customary verbiage of practice, as indicated, *e. g.*, in the text-books, and, finally, to the reported cases.

The Code, as amended to January 1, 1903, refers to "nonsuit" in courts of record three times,<sup>7</sup> "nonsuit" in justices' courts three times,<sup>8</sup> "dismissal of complaint" twelve times,<sup>9</sup> "discontinuance of ac-

<sup>1</sup> §§ 1699, 1845, 3235.

<sup>2</sup> §§ 1699, 1704, 1736.

<sup>3</sup> §§ 2956, 3139.

<sup>4</sup> §§ 1674, 2958, 3015, 3075.

<sup>5</sup> §§ 2949, 2950.

<sup>6</sup> § 3015.

<sup>7</sup> §§ 1021, 1182, 1187.

<sup>8</sup> §§ 3007, 3013, 3015.

<sup>9</sup> §§ 405, 412, 821, 822, 890, 1209, 1426, 1533, 1634, 1640, 1642, 2956.

tion" ten times,<sup>1</sup> "abatement of action" nine times,<sup>2</sup> and "withdrawal of action" once.<sup>3</sup> The three sections referring to nonsuits in courts of record merit separate comment.

Section 1021 of the present Code, as originally enacted, read thus: "The decision of a court, or the report of a referee, upon the trial of a demurrer, must direct the judgment to be entered thereupon, or other disposition of the case, as prescribed in section 1018 of this act."<sup>4</sup>

Thus it is seen that § 1021 originally related exclusively to the trial of a demurrer (which trial raised an issue of law only); and the substance of the section was that the court, or a referee, in the "decision" or "report," must direct what judgment or order should be entered thereupon.

In 1879<sup>5</sup> the original section 1021 was shortened so as to read: "The decision of the court, or the report of a referee, upon the trial of a demurrer, must direct the final or interlocutory judgment to be entered thereupon"; and the present second sentence of the section was added, but which is irrelevant to the subject now under discussion.

In 1895<sup>6</sup> the Legislature, in its wisdom, gave to the first sentence of § 1021 the following remark-

<sup>1</sup> §§ 44, 405, 412, 585, 680, 1426, party in fault to plead anew or amend; to direct the action to be

<sup>2</sup> §§ 44, 412, 585, 755, 761, 764, divided into two or more actions; to award costs, and otherwise to

1674, 1704, 1736. dispose of any question arising

<sup>3</sup> § 3015. upon the decision of the issue

<sup>4</sup> Section 1018 provided that the referee exercises the same power as the court, to permit a

referred to him."

<sup>5</sup> By ch. 542.

<sup>6</sup> By ch. 546.



able form: "The decision of the court, or the report of a referee, upon the trial of a demurrer, or upon the trial of the issues of fact or law, where a nonsuit is granted, must direct the final or interlocutory judgment to be entered thereupon, and in any such case it shall not be necessary for the court or referee to make any finding of fact."

Thereby "nonsuit" was, for the first time, introduced into the section, together with an element of obscurity which it would be foreign to the present purpose to do more than note.

Section 1182 has already been sufficiently noticed.

In 1895<sup>1</sup> the following new matter was added to original § 1187: "When a motion is made to nonsuit the plaintiffs or for the direction of a verdict the court may, pending the decision of such motion, submit any question of fact raised by the pleadings to the jury, or require the jury to assess the damage. After the jury shall have rendered a special verdict upon such submission, or shall have assessed the damage, the court may then pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to. On an appeal from the judgment entered upon such nonsuit or general verdict such special verdict, or general verdict, shall form a part of the record, and the appellate division may direct such judgment thereon as either party may be entitled to." As will be mentioned below, this amendment of the Code has led to a decision and judgment which

<sup>1</sup> By ch. 946.

are agreeably serviceable in exhibiting the status of nonsuits in the present practice in New York.

Rule 30 of the General Rules of Practice provides that "on a hearing before referees the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision." This rule has the appearance of making a careful distinction between a "nonsuit" and a "dismissal of complaint," also between a submission to and an infliction of each of those experiences. But if the reader tries to learn the details of this scientific precision he will discover that nowhere else in the rules is "nonsuit" mentioned, and that no light is to be gathered from any of the sections of the Code on the question of the nature and effect of a nonsuit in the New York practice.

The customary verbiage of practice leaves a doubt as to the relation existing between the new code expression "dismissal of complaint," and the resurrected or perpetuated "nonsuit" of the old law; the conclusion, appearing to have the most plausibility, being that no one knows what the relation is, and that the only thing certain about a nonsuit granted at a trial is, that plaintiff thereafter finds himself out of court, with an impression that he can sue again for the same cause of action, and eventually will encounter an order or judgment rendered against him, *dismissing his complaint*. In

Baylies' Trial Practice,<sup>1</sup> the expression "a nonsuit or dismissal of the complaint," or its equivalent, is employed no less than twelve times in as many pages, in stating the details of practice on a trial by jury, the conjunction "or" being apparently used to indicate, not an alternative, but equivalence.

As to the reported cases: In *Lomer v. Meeker*,<sup>2</sup> 1862, which was an action on a promissory note, the defense of usury was proved without any "conflict in the testimony," and at the close of the evidence defendants moved "to dismiss the complaint" on the ground of such proof, but the motion was denied, and the jury found a verdict for plaintiff, whereon was entered a judgment which was affirmed at General Term. This was *held* to be error, by the Court of Appeals which granted a new trial, the opinion being written by SMITH, J., who said: "There was no conflicting evidence, and nothing proper to be submitted to the jury. It was the duty of the court in such case *to dismiss the complaint, or nonsuit the plaintiff, or direct a verdict for the defendants.* . . . The judge, in this case, should therefore have nonsuited the plaintiff *or dismissed the complaint, which is equivalent to a nonsuit.*" Upon the strength of this case, Baylies writes: "A dismissal of the complaint is equivalent to a nonsuit. *Lomer v. Meeker*, 25 N. Y. 361."<sup>3</sup>

In *Stuber v. McEntee*,<sup>4</sup> which was an action for

<sup>1</sup> 2d ed.

<sup>2</sup> 25 N. Y. 361.

<sup>3</sup> Trial Prac. 308.

<sup>4</sup> 142 N. Y. 200.

negligence, defendant's counsel at the close of the evidence moved "to dismiss the complaint" on the ground "that there has been no negligence shown on the part of the defendant." The trial judge said: "I will dismiss the complaint." The judgment, entered March 28, 1892, recited: "This action having been tried before the court and a jury, and a decision for the defendant dismissing plaintiff's complaint duly rendered on the 8th day of February, 1892, and the costs having been adjusted at," etc.; and adjudged that defendant recover said costs of the plaintiff, and have execution therefor. In its Opinion the Court of Appeals said: "The trial resulted in a nonsuit. . . . In view of the fact that the nonsuit was not granted on any such ground . . ., we think that this point is not sufficient to sustain the judgment of nonsuit."

In *McClure v. Central Trust Co.*,<sup>1</sup> which was tried before a referee, defendant's counsel, at the close of the evidence, moved "to dismiss the complaint on the ground that the testimony did not establish any cause of action against the defendant." The referee reported that the defendant "is entitled to a dismissal of the complaint *upon the merits*, with costs, and I hereby direct judgment accordingly." The judgment "adjudged that the complaint of the plaintiff in this action be dismissed, and that the defendant recover of the plaintiff" his costs. In its Opinion the Court of Appeals says that certain matters of defense "were not entered upon by the defendant because a nonsuit was granted."<sup>2</sup>

<sup>1</sup> 165 N. Y. 108.

<sup>2</sup> *Id.* 129, 130.

In *Hoey v. Met. St. Ry. Co.*,<sup>1</sup> which was an action for negligence, defendant's counsel, at the close of the evidence, moved "for a dismissal of the complaint or for the direction of a verdict." Upon this motion the trial justice reserved his decision, and thereupon submitted to the jury a series of specific questions of fact, under Code, § 1187, with instructions to render, also, a general verdict. The jury answered the questions, and rendered a general verdict for plaintiff for \$12,500 damages. In the subsequent proceedings in this action, we at length obtain some definite *data* as to whether a "nonsuit" really survives to-day, in New York, and as to what it is. The jury was discharged, and the trial justice, after consideration, directed that a judgment be entered dismissing the complaint upon the merits, and setting aside the general verdict and the jury's answers to all the questions except one. On appeal from this judgment, the Appellate Division referred to section 1187 of the Code, and *held* that the trial court "had no power to dismiss the complaint upon the merits, nor to set aside the answers of the jury to the specific questions of fact submitted to, or the verdict rendered by, them"; that, under said section the trial court could, "after the rendition of the special verdict (?) by the jury, have adopted either one of two courses; he could nonsuit the plaintiff or direct the jury to render a general verdict. He did not direct a general verdict, nor did he nonsuit the plaintiff, but instead directed judgment dismissing the complaint upon

<sup>1</sup> 70 App. Div. 60; 1902.

the merits. This was clearly erroneous. . . . The judgment should have been one nonsuiting the plaintiff, instead of dismissing the complaint upon the merits. . . . The judgment should be corrected as indicated in this Opinion, and as thus corrected, affirmed." The order of correction and affirmation, as entered, accordingly read:

"Ordered, That the judgment so appealed from be amended and corrected by striking therefrom the following:

" 'Ordered and adjudged that the complaint herein be and the same hereby is dismissed upon the merits . . . except the first finding,' and substituting in place thereof the following:

" 'Ordered and adjudged that the motion of the defendants for a nonsuit be and the same hereby is granted, and the complaint dismissed, but not upon the merits.'

"And it is further ordered that the said judgment as above corrected be affirmed without costs to either party." <sup>1</sup>

#### CONCLUSIONS.

The name and fact of "nonsuit" survive to-day under the New York Code of Civil Procedure. The name occurs in the statute, in the General Rules of Practice, in the text-books and in the reported opinions of the courts, and is uttered, though probably rarely, by counsel for defendants, at trials in courts of record, in their motions. Non-

<sup>1</sup> See, now, the recent decision, *tars v. Syr. R. T. Ry. Co.*, 178 Lindenthal v. Germ. L. Ins. Co., N. Y. 50. 174 N. Y., 76, on p. 81; also Wal-

suits are either voluntary or compulsory. The continued existence of the voluntary kind is implied in the clause of Rule 30, providing that plaintiff "may submit to a nonsuit," etc., and in Code, § 1182, restricting plaintiff's right "to submit to a nonsuit" at a trial in a court of record. But it is believed that the practice of voluntarily procuring a nonsuit by plaintiff at a trial is infrequent, a more advantageous method of procedure being to invoke the discretionary power of the trial judge to permit the "withdrawal of a juror," whereby the trial but not the action is terminated.<sup>1</sup> If defendant's counsel, at a trial, moves to "dismiss the complaint" under circumstances which do not justify a dismissal on the merits, the court deems him to ask for a nonsuit, only, *i. e.*, a dismissal which is not a bar to a new action for the same cause. When a "nonsuit" reaches the stage of rendition of judgment the *word* does not ordinarily appear in the adjudicating clause.

A "nonsuit," in New York, is now equivalent to a "dismissal of the complaint," *not on the merits*, the italics implying that the determination is not *res judicata*, except on the technical question determined.

It is believed that no substantial difference exists, in the ordinary case, between the effect of a dismissal of the complaint upon the merits, and that of a verdict for defendant.

The substance of the old "judgment *as in case*

<sup>1</sup> See *Dillon v. Cockcroft*, 90 N. Y. 649, 650; *Freeman v. Grant*, 132 N. Y. 22, 29.

of a nonsuit," which figured so largely in the old English and the former New York practice,<sup>1</sup> entered in consequence of a plaintiff's neglecting duly to bring on the issue to be tried, survives in an order, procurable on defendant's motion, dismissing the complaint for failure to proceed in the action.<sup>2</sup> It has been held that a dismissal granted under such circumstances is not a bar to a subsequent action.<sup>3</sup>

In England the old practice, in respect of nonsuits, has been quite upset by the new procedure. Order 26, entitled "Discontinuance," is a complete code, applicable to the whole subject of discontinuing an action.<sup>4</sup> A plaintiff there has no longer any *right* to submit to a nonsuit at a trial. The principle adopted is, that, after proceedings have reached a certain stage, the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. The substance is, that, when the parties are face to face, it is only at the discretion of the judge that the plaintiff can be allowed to withdraw from the action, with a right of bringing another for the same subject-matter. The plaintiff, in short, cannot now claim, as of right, to be nonsuited, and if he offers no support to his action when it comes into court there must be a verdict for defendant;<sup>5</sup>

<sup>1</sup> 14 Geo. II, c. 17 (1741); 1 Van N. & W. Rev. L. of 1813, c. 56, § 12, p. 521.

<sup>2</sup> Code, § 822; Gen. Rule of Prac. 36.

<sup>3</sup> *Harrison v. Wood*, 2 Duer, 50.

<sup>4</sup> See Snow, Burney & Stringer, Ann. Prac. (1901), vol. 1, p. 327.

<sup>5</sup> *Fox v. Star, etc., Co.*, 1 Q. B. p. 639; aff'd in House of Lords, Appeal Cas. (1900) 19.



the law thus affording a marked contrast to that prevailing in New York, where judgment for defendant on the merits for mere failure of proof on the part of the plaintiff is erroneous.

"The action was at law, and the defect in the plaintiff's case was a failure of proof. The dismissal on the merits was therefore erroneous. There should have been only the ordinary *non-suit*." <sup>1</sup>

*"Suit the action to the word."*

SHAKS.

<sup>1</sup> *Colyer v. Guilfoyle*, 47 App. Div. (1900) 302, 306.

## VI.

### THE DOMESTIC RELATIONS LAW OF NEW YORK.

The Domestic Relations Law of the State of New York was framed by Commissioners appointed under L. 1889, ch. 289, entitled "An Act to provide for the revision and consolidation of certain of the general statutes of this State"; which made it the duty of the Commissioners "to prepare and report to the legislature bills for the consolidation and revision of the general statutes of this State," upon four specified subjects;<sup>1</sup> also, to submit to the legislature, in 1890, a report, and therein "suggest such omissions, contradictions and other imperfections as may appear in the existing statutes so proposed to be revised and consolidated, with recommendations for the amendment thereof," and to "provide for the specific repeal of the statutes which would be superseded or covered by the general statutes so proposed by the said Commissioners"; and it was further provided that "said Commissioners *may* also prepare and at the same time report to the legislature bills for the consolidation and revision, in like manner, of such other general statutes of the State as such Commissioners may consider most in need of consolidation and revision."

<sup>1</sup> § 1.

By L. 1890, ch. 313, entitled "An Act making an appropriation for continuing the work of the Commissioners of statutory revision," it was provided that "the Commissioners *shall* continue the work of revision and consolidation of the statutes of this State under said chapter 289 of the Laws of 1889, and according to the plan submitted in their report to the present legislature, and they *may* make reports from time to time to the present legislature and *shall* submit a report at the opening of the next legislature and shall cause such work to be so far progressed by that time that it can be completed by January 1, 1892."

The so-called "Ninth Edition" of "The Revised Statutes"<sup>1</sup> embodies, of the so-called "General Laws," framed by these commissioners and others, twenty-nine chapters;<sup>2</sup> also the "University Law," "the Consolidation School Law," and "the Excise Law," which are not "G. L.," though neither special nor local; then follows the honeycombed wreck of the venerable R. S. of 1827-1828; while, last but not least, are 1,144 pages of "General Statutes" of 1777-1895, which are unshackled, being "*independent* of the Revised Statutes of 1827-1828, of the Civil, Criminal and Penal Codes, and of the Revised General Laws of 1890-1895."

When he considers that to this array are to be added the Code of Civil Procedure, the Code of Criminal Procedure and the Penal Code, aggregat-

<sup>1</sup> 1896.

17, 18, 19, 20, 25, 31, 33, 35, 36,

<sup>2</sup> Ch. 1, 2, 5, 6, 7, 8, 9, 11, two chapters 13, and chapters 14, 16,

37, 38, 39, 40, 41, 42, 43, 45.

ing 5,088 sections; which also rejoice in a degree of independence, the student or practitioner of the law may be excused if he look around for a helper—even a codifier would be welcomed, unless his dismay would be increased by the information that this is the result of codification.

It is probably undisputed that a "Codification" implies a *complete* collection and arrangement of the positive laws, written *and unwritten*, on the subject taken in hand. No one could object to an orderly arrangement and condensation of existing *statutes* on any subject. An ideal method of general legislation would include an exhaustive table of chapters and subdivisions, into one or more of which all new statutory enactments would naturally enter as components. To the uncritical reader of the Acts, which constitute the authority of the Revision Commissioners of 1889, it seems that no codification, in the proper sense, of the law prevailing in this State was intended. Hence, it would be a matter of less surprise, if the new "Domestic Relations Law" did not aim at, or accomplish, a true codification, but only codified (?) existing statutes, and added some parts of the common law on this subject.

The profession and the public, however, doubtless, all looked to a revising or codifying commission, in the Empire State, operating in the end of the century, for certain marked and beneficent results, in any work involving a new form of the statutes, on any branch of the substantive law, especially so important a branch as the law of the

domestic relations. They would certainly be justified in expecting, perhaps, first of all, a true logical division of the subject, *i. e.*, an arrangement of the sections under properly co-ordinated headings and sub-headings. Minor subjects of anticipation would be the use of grammatical language, uniform phraseology, a reasonable degree of rhetorical smoothness, condensation, an avoidance of inconsistencies, and a regard to the form and substance of the related portions of the established Code of Civil Procedure.

It is with unqualified respect, and yet with unembarrassed freedom, that a rapid glance is taken at "Chapter 48 of the General Laws,"—The Domestic Relations Law,<sup>1</sup>—for the purpose of noting, briefly, how far such anticipations of improvement in the statute law, on this fundamental subject, are met by the new revision.

The chapter, on this subject, which was framed by the eminent revisers of 1828–30, presents an admirable model of orderly *division*. That chapter (8) is entitled, "Of the Domestic Relations." It comprises four titles, respectively: "Of Husband and Wife"; "Of Parents and Children"; "Of Guardians and Wards"; "Of Masters, Apprentices and Servants." Each subdivided "title" contains a series of "articles," consisting of sections relating to the subject of the "title."

In the new law, there is but one division—into eight "articles." It is with a feeling little short of astonishment, that one reads the captions of

<sup>1</sup> L. 1896, ch. 272, passed April 17, 1896.

this list of (what should be) co-ordinate divisions. "Article 1. Unlawful Marriages. 2. Solemnization, Proof and Effect of Marriage. 3. Certain Rights and Liabilities of Husband and Wife. 4. The Custody and Wages of Children. 5. Guardians. 6. The Adoption of Children. 7. Apprentices and Servants. 8. Laws repealed; When to Take Effect."

The first section<sup>1</sup> gives *the chapter* its English name, and defines a "minor," but carefully abstains from defining an "adult," who appears on the stage, undefined, in article 6. The Code of Civil Procedure speaks uniformly of an "infant," in designating a natural person of the age of less than twenty-one years. Section 10<sup>2</sup> declares that a *lawful* marriage (hereafter contracted) is as *valid* as if the article had not been enacted. Section 11 provides for the solemnization of a marriage before a justice of a district court in the City of Brooklyn; there being no such courts in that city.<sup>3</sup> Subdivision 1, of § 11, specifies a "clergyman," as a lawful solemnizer of a marriage, and the last sentence of the section *defines* a "clergyman" only as "used in the *following* sections of this article." In section 13, we read, "if more than one are present"; and, in section 14, "if more than one is present." Section 13 requires the clergyman, etc., under certain circumstances, to administer an oath, but does not prescribe its tenor, nor provide any sanction in case of falsity. Section 17 gives a schedule of fees

<sup>1</sup> Under Article 1.

<sup>2</sup> Under Article 2,

<sup>3</sup> See L. 1888, ch. 100.

which "may be collected" for services connected with solemnization; but there is no mode of collecting indicated, and a clergyman seems to be prohibited from taking more than one dollar. Section 18 declares that "an illegitimate child whose parents have *heretofore* intermarried . . . shall thereby become *legitimized*." Section 21 provides that "a married woman has all the *rights to be liable* on" her contracts as if she were unmarried. Section 26 introduces a new tenure of real property—"by the entireties." Section 27 adds, to the injuries (to *persons* and to *property*) recognized by the Code of Civil Procedure, two others—injuries to character, and injuries arising out of the marital relation; and contains an obscure intimation of a distinction between "wrongful" and "tortious" acts. Section 29 allows a trustee to *convey* the rents, issues and profits of property to a married woman. Sections 40 and 41 revivify two ancient sections relating to the subject of *habeas corpus* for minors, under circumstances involved in much obscurity. The running title of § 40 requires the detention to be by the parent, but the body of the section does not. Both of the sections seem to invade the domain of procedure-law; and the antiquity, and perhaps obsolescence, of the provisions are in keeping with the profuse verbiage with which the court is allowed to "award *charge and custody*" of the child, "under such *regulations and restrictions* and with such *provisions and directions*, as the case may require."

Article 5, on "Guardians" embodies in five sec-

tions all the law deemed necessary to be codified and preserved on this immense subject. This condensation is rendered possible, in part at least, by the expedient of declaring,<sup>1</sup> as to a minor, under certain circumstances, that "the guardianship of his property *with the rights, powers and duties of a guardian in socage*" (?) shall belong to specified persons, thus remanding the student and practitioner to the sepulchral lore of Bracton, Fleta, Coke, Littleton & Co., for a knowledge of the rights, powers and duties of this knight of the Norman ploughshare, the same "as if this article had not been enacted."

This burden is aggravated by the terms of the section,<sup>2</sup> which apply in all cases "where a minor, for whom a guardian of the property *has not*" (*i. e.*, when this article takes effect?) "been appointed, *shall* acquire real property"; and the door seems also to be opened to a conflict between alleged guardians. It may be surmised that a "guardian appointed in pursuance of this article"<sup>3</sup> will be construed to be identical with a "guardian appointed in pursuance to this section."<sup>4</sup>

In all seriousness, it is disappointing to contemplate this article on "Guardians," as the result of a revision and codification of the law, and therefore the best form in which the New York lawyer can hope to see this law, for at least the next quarter of a century. In the brief compass of five sections, there are agglomerated disjointed allusions to a

<sup>1</sup> § 50.<sup>2</sup> *Id.*<sup>3</sup> *Id.*<sup>4</sup> § 51.



variety of guardians—the grand result being, candidly speaking, nothing better than a jumble. Alongside of our “Guardian in socage” with his unknown, mediæval “rights, powers and duties,”<sup>1</sup> are found “general guardian of the property,”<sup>2</sup> “testamentary guardian,”<sup>3</sup> “joint guardian”—of what, and whether general, not stated,<sup>4</sup> “a person appointed guardian by deed,”<sup>5</sup> and finally, and most generally, “a general guardian,” pure and simple.<sup>6</sup> The “minor” of the first three sections of the article becomes a “ward” for the first time, in § 53. It is only a “testamentary guardian” or a “person appointed guardian in pursuance of this section”<sup>7</sup> by deed, who has the enviable but indefinite privilege of bringing “such actions as a guardian in socage might by law”<sup>8</sup>—referring to *leges angliae*. The difficulties of “a general guardian or guardian in socage”—let us hope, *not both*<sup>9</sup>—in managing the “property or inheritance” will be novel, if not onerous in repairing and maintaining such “gardens” as constitute ‘*appurtenances to the lands*’ of his ward!” Perhaps hanging gardens might be deemed to come within the equity of the statute?

This brings the examination down to section 54; but as there *are no* sections 5–9, 19, 30–39, or 43–49, the progress made in the criticism of the Domestic Relations Law, is less than might be inferred.

<sup>1</sup> § 50.<sup>2</sup> *Id.*<sup>3</sup> *Id.*<sup>4</sup> § 51<sup>5</sup> *Id.*<sup>6</sup> § 53.<sup>7</sup> *Id.*<sup>8</sup> § 52.<sup>9</sup> § 53.

There remain the important subjects of "the adoption of children"<sup>1</sup> and "Apprentices and Servants."<sup>2</sup>

The last three divisions of the new "Chapter 48 of the General Laws" are—"Article 6, The Adoption of Children; Article 7, Apprentices and Servants; Article 8, Laws Repealed, when to take Effect."

The adoption of children is not strictly one of the domestic relations, and so hardly deserves a position as one of the main headings under the "domestic relations law." The subject seems rather to merit a place as a sub-head under the now discarded relation of parent and child, another relic of which is left us in Article 4, "The Custody and Wages of Children"; monotony in subjects being avoided by the intervention of Article 5, on Guardians, between that and "Adoption."

An inspection of the elaborate article on "Adoption" leads to the conclusion that the "children" are "minors" (see definition of minor, in the article on "Unlawful Marriages"). No feature of a codification, it is safe to say, is more important, or requires greater care, or gives better evidence of the skill and erudition of the codifier, than *definitions*. Accordingly, we look with interested anticipation at the opening section of the article on "Adoption," which is announced as consisting of "definitions; effect of article." An "adult" here appears for the first time; and, although he or she is not defined, no great harm can result, since every

<sup>1</sup> Art. 6.

<sup>2</sup> Art. 7.

one who has not forgotten his Latin can imagine the implication, which is, perhaps, confirmed by § 1, in the article on "Unlawful Marriages," viz.: that he is a "minor" who "reaches majority." The term "adoption," however, obviously stands in a different position; being generic, it includes subordinate species, some more and some less advisable,—such as the adoption of this Chapter, for instance,—even though legal, which last-mentioned quality belongs to *our* adoption, the same being "the legal act whereby an adult takes a minor into the relation of child, etc." The *et cetera* is disappointing, because, without it, the definition is a gem of conciseness and perspicuity; in fact—complete. To add anything is surplusage, which is an evil, of itself, in a codification where we are treated to single sections necessarily containing four hundred words!<sup>1</sup> Yet the legislature, doubtless *ex abundante cautela*, chose to add a specification of the content of this "relation," viz.: that "adoption is the legal act whereby an adult . . . . thereby acquires the rights and incurs the responsibilities of parent in respect to such minor."

"A *voluntary* adoption" is next defined, as "any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution." Candor compels a concession that there are some difficulties here. Evidently, there must be involuntary adoptions, but why should an indigent child or an orphan asylum, or a

charitable institution be unwilling? Besides, would not their lack of volition make the act of adoption illegal and void, under an adaptation of the maxim "*volenti injuria non fit*"? There is some doubt, also, as to what it is, to be "a public charge *from* an orphan asylum," etc.; and it is to be hoped that this is not a new domestic relation, here surreptitiously introduced, without any reference to that fact in the title of the act.

Among the salutary "effects of article" are the permission to receive in evidence proof of prior lawful adoptions, and the equally necessary precaution of reminding the student that this codification does not go back of the historic date of June 25th, 1873. That, if recollection serves accurately, was the summer when the great panic in lands, tenements and hereditaments was approaching, and clearly "any will, devise or trust, made or created before" then, ought not to be "altered, changed or interfered with" (*i. e.*, or *otherwise* interfered with) by anything "in this article *in regard to an adopted child inheriting from the foster parent*" (sic).

Section 61 declares "whose consent necessary" *to adoption*; no exclusion of involuntary adoptions being intimated. The primary requisite is<sup>1</sup> the consent "of the minor, if over twelve years of age." But suppose such minor is indigent, or is a public charge from an orphan asylum! It has been seen that, in such case, the adoption is involuntary, and hence the minor is, under the "definition"<sup>2</sup> conclusively presumed to be unwilling. The incau-

<sup>1</sup> Subd. 1.

<sup>2</sup> See *supra*.

tious reader might hence be led to fear that, in such an exigency, this laborious and permanent codification of one of the incidents of a most interesting domestic relation would prove abortive. But it is only fair to treat the article as a whole, just as the courts do a "will, devise or trust"; and, by glancing forward to § 65, it is found that, in adoptions from asylums, etc., the instrument "*may be signed by the child (i. e., minor) if over twelve years of age.*" Thus the evil is partly averted.

The judicial officer who supervises the process alike in voluntary and involuntary adoptions, is "the county judge or the surrogate of the county where the foster *parent* or parents *reside*," and, in the case of asylums, etc., the adoption only takes effect from the time of the filing of the instrument and order "in the office of the county clerk where the foster parents reside" (!); which, if the county clerk likes it, should not be objected to by outsiders.

Manifestly, the most important provisions in the article are those concerning the "effect of adoption," which are given in § 64. Though the running title of the section is general, it is clear that the section relates *only to voluntary* adoptions, for it says "thereafter," *i. e.*, after the "requirements" of § 62 have been "followed," and the "moral and temporal" interests of the child (minor) have been guarded under § 63. It is a startling feature, therefore, of this codification, that an indigent child, or a child who is a public charge from an

orphan asylum or a charitable institution, acquires, by adoption, no rights which any one is bound to respect. The legislature can hardly have intended this result as a penalty on the child (minor) for being unwilling, seeing that the foster parent, who, *ex hypothesi*, is always willing, is left in the same predicament.

The manner in which a voluntary adoption alters, changes or interferes with property rights is mainly in respect to rights of "inheritance and succession."<sup>1</sup> The natural parents lose these rights as to property of the adopted minor, who, however, retains his, as to such parents' property. As between the foster parents and the minor, the provision is not the same, or so clear. They have only, "the right of inheritance from each other," the right of succession not being mentioned; and this right is subject to the perspicuous and comprehensible qualification that "as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying (*sic*) without heirs, the minor is not deemed the child of the foster parent so as to defeat the right of remaindermen"; the bearing of which lies in the application on it.

The last three sections of the article are concerned with the dissolution of the foster-relation. The process or result is termed an "abrogation," which, though not defined, cannot justly give rise to cavil, it being clearly suggested, by the etymology, that one or both of the contracting parties is

<sup>1</sup> § 64.

or are guilty of "begging off" (*ab-rogo*); and, as there is no question about alimony, the matter is arranged with a simplicity unknown to the primary domestic relation, though not without three different sets of machinery provided in three sections which number 300, 400 and 340 words, respectively.

Section 66 regulates "abrogation of voluntary adoption." The prominent peculiarity of this abrogation is a requirement of the consent of "the persons whose consent would have been necessary to an *original* adoption"! Inasmuch as the article contains, elsewhere, not a hint of any secondary adoption, the necessity seems forced on the mind, that the codifier (and, therefore, the legislature) got "a little mixed," at this point, the explanation perhaps being that, in codifying, a suggestion obtruded itself, that this very abrogation involved, in some sort, an adoption, viz.: an adoption of a resolve to abrogate, and so, in the simplest manner possible, the adoption of the child (minor) assumed the appearance of an *original* one, and gave rise to the philosophic and rhetorical contrast. The *procedure* is regulated with a care and minuteness rendering the greater part of the section (which directs "the county judge or surrogate of the county where the foster *parents resides*" how to act) worthy of the honor of being transplanted from this codification of substantive law, and being set as a living stone in the adjective wing of the legal temple.

If this be true of § 66, what shall be said of § 67, which provides for an application for abrogation,

where a public charge from an orphan asylum is suffering from cruelty or neglect, and which violates the Constitution by expressly declaring nearly half of the chapter of the Code on surrogates' courts, applicable to the situation?

The lamented Commissioner, who let slip an occasional substantive clause into the Code of Civil Procedure, has been, on that ground, buried under a load of obloquy which evidently has no terrors for at least one successor. The scheme of procedure provided by § 67 is unique in two particulars. The initial process is made a "citation," which, for years, has been, happily, exclusively in use in the proceedings in surrogates' procedure, proper, just as a summons is the uniform process for commencing a civil action. But, now, this clear-cut division is invaded, and, without any good reason, a *citation*, instead of an *order*, to show cause is to be issued on an application for abrogation of adoption of a public charge from an orphan asylum or charitable institution. Perhaps the determination to adopt the citation was the ground of the change of jurisdiction whereby a surrogate's court, instead of a surrogate, is to act under § 67 or § 68, though a surrogate was authorized under § 66. The county judge was deemed equal to the emergency of issuing a citation and of learning the practice of a surrogate's court; wherefore he, as distinguished from the county court, may act under any of the three sections; but if an applicant under § 67 or § 68 does not choose to go to the county judge, he or she must, at his or her peril, go into the



surrogate's court, and not apply to the surrogate.

The Code of Civil Procedure has been attacked on the score of its alleged vicious phraseology; and, changed, altered and otherwise interfered with, by two decades of indiscriminate legislation, it is, indeed, to-day, "*monstrum, horrendum, informe, ingens.*" But, as enacted, it was a classic, in this respect, compared with the newly adopted article on adoption, which, among other notable and astonishing freaks of grammar and rhetoric, embosoms eighty-five "such's" in its nine sections, the closing section gallantly bringing up the rear, and carrying off the palm, with twenty-five recurrences of that necessary and euphonious monosyllable.

"*Our Poor Relations.*"

HAMLEY.

## VII.

### THE EXIGENCIES OF EMINENT DOMAIN.

Under the New York constitutional provision, "nor shall private property be taken for public use without just compensation," it has long been understood by many, to be the law, that a statute providing for the taking of private property for public use, unless it contain a provision for compensation, to be made to the owner of the property, is unconstitutional.

As long ago as 1837, the Court of Errors of that State said that, "before the legislature can authorize the agents of the State and others to enter upon and occupy, or destroy or materially injure, the private property of an individual, except in cases of actual necessity, which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages or compensation; and that he is not bound to trust to the justice of the Government to make provision for such compensation by future legislation. . . . The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby he may obtain such compensation through the medium of the

courts of justice, if those whose duty it is to make such compensation refuse to do so. . . . If the true construction of this charter was such as is contended for by the defendant's counsel, I should *hold* that the provision, which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void."<sup>1</sup>

In 1844, the Supreme Court of New York said: "Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the State itself, that at least certain and ample provision must be first made by the law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals, or otherwise, without any unreasonable or unnecessary delay, otherwise, the law making the appropriation is no better than blank paper."<sup>2</sup>

In 1882, the New York Court of Appeals said: "The courts, in construing the constitutional guaranty, have departed from what may seem its plain and natural meaning, and have *held* that the payment for property taken *in invitum* for public use need not be concurrent with the taking, but that it is sufficient if the law authorizing the taking also provides a sure and convenient remedy by which the owner can subsequently coerce payment

<sup>1</sup> *Bloodgood v. Mohawk, etc., R. R. Co.*, 18 Wend. 9.

<sup>2</sup> *Peo. ex rel. v. Hayden*, 6 Hill, 361.

by legal proceedings. If such provision is not made, then, as was said by NELSON, Ch. J., 'the law making the appropriation is no better than blank paper.' " 1

It might have been imagined that the rule, as above laid down, would not be applied in a case where it was uncertain (if any uncertainty in the law be possible), at the time when a statute was enacted, whether its scheme involved the taking of any private property for the public use.

But such was, evidently, not the view entertained by the Court of Appeals, in 1877; for, certain private-property owners having objected, to the statutes under which the New York Elevated Railroad Company was proceeding to construct its tracks, that those statutes made no provision for compensation to owners of property abutting on the streets of the route, the court pointed out that the Act of 1866<sup>2</sup> made the provisions of the General Railroad Act of 1850, as to acquiring real estate by hostile proceedings, applicable to the company to be formed under that Act; that the Act of 1867<sup>3</sup> provided that "any private property used or acquired shall be compensated for by said company under the provisions of existing laws authorizing the formation of railroad companies, and the acquisition of rights of way therefor"; and that § 36 of the Rapid Transit Act of 1875 provided that the elevated railroad company might construct the connecting routes "with all the rights

<sup>1</sup> *Sage v. City of Brooklyn*, 89 N. Y. 195.

2 Ch. 697.  
2 Ch. 489.

and with like effect as though the same had been a part of the original route of such railway"; and the court *held* explicitly as follows:

"It is further claimed that no provision is made in the Act for compensation to the owners of property bounded upon the streets in the City of New York through which the New York Elevated Railroad is authorized to make its connections, and that, therefore, § 36, so far as relates to this company, is unconstitutional. This claim rests upon the assumption that the abutting owners upon such streets have property rights therein of which they are to be deprived, and for which they are entitled, under the Constitution, to compensation. Whether they have such property rights, it will not be necessary to determine upon this appeal, for the reason that provision is made for compensation. . . . It seems to me that there is no room for doubt that ample provision is made for compensation for any property rights the abutting owner may have in the streets. I conclude, therefore, that there are no constitutional objections which call for the reversal of the order appealed from."<sup>1</sup>

From the foregoing decisions, it appears that the "taking" is effected, within the meaning of the Constitution, by the passage of the appropriating statute, and that "just compensation" is made, within the meaning of the same instrument, if that statute makes due provision for obtaining such compensation; so that the constitutional provision is, in effect, construed as if it read: "Nor shall any

<sup>1</sup> *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 354, 355.

statute be passed, providing for the taking of private property for the public use, without also providing for the making of just compensation therefor."

In 1892, the New York legislature passed the Act<sup>1</sup> to regulate, improve and enlarge Park avenue above 166th street, in the city of New York, and for the elevation of the structure of the New York and Harlem Railroad Company, the tracks of which had been laid in that avenue; the Act concededly containing no provision for any compensation to any owners of private property abutting on said avenue, for their property, if any, to be taken by such improvement and elevation of railroad structure.

The Act of 1892 has recently been unequivocally declared not to be unconstitutional in omitting to make provision for such compensation. In *Muhler v. N. Y. & Harlem R. R. Co.*,<sup>2</sup> which was an action brought by an abutting owner for an injunction against the maintenance of, and operation of trains on, the steel railroad viaduct in Park avenue, constructed under the Act of 1892, on the ground of an alleged invasion of plaintiff's property rights in the street, the prevailing Opinion in the Court of Appeals asserted "that the State had the power to make this improvement, as it did, without compensation to the abutting owners,"<sup>3</sup> and even the dissenting Opinion said: "The claim that the Act of 1892 is unconstitutional cannot be

<sup>1</sup> Ch. 339.

<sup>2</sup> 173 N. Y. 556.

<sup>3</sup> 173 N. Y. 549; Feb. 1903.

sustained." It is true, that the prevailing Opinion, in support of its ruling of constitutionality, refers to a prior decision,<sup>1</sup> as settling that question; and it is also true, that the court, in the Fries case, *held* that plaintiff could not assail the constitutional validity of the statute, in that court, because he had not raised it in any court below,<sup>2</sup> citing *Dodge v. Cornelius*.<sup>3</sup> But it is believed that no doubt can exist, that the Act of 1892 is to be regarded as constitutional, under the law, as expounded by the highest State court, in view of the following expressions occurring in the prevailing Opinion in the Muhlker case: "It is again urged on this appeal, that the Act under which these changes were made is unconstitutional. . . . But that question was considered and passed upon by this court in the Fries case, every member of the court, whether voting with the majority or minority, agreeing that the Act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: 'I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned.' And Judge MARTIN commenced his Opinion by saying: 'although there is a singular divergence of opinion among members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it.'

<sup>1</sup> *Fries v. N. Y. C. & H. R. R. Co.*, 169 N. Y. 270.

<sup>2</sup> 169 N. Y. 277.

<sup>3</sup> 168 N. Y. 242.

And Judge CULLEN said: 'The statute is not unconstitutional, and no decision to that effect is necessary to secure plaintiff's rights.' " <sup>1</sup>

The declared constitutionality of the Act of 1892 must rest on one of the following grounds, viz.: either (1) because the abutters on Park avenue do not own easements of light, air and access in that avenue, or (2) because, such easements being conceded to exist, they are not property, or (3) because, the easements being conceded to exist, and to be property, they were not "taken" by the Act.

(1) At least since 1891, there has been no room to question that, in the State of New York, "the owner of a lot abutting on a city street, the fee of which is in the municipality, has, by virtue of proximity, special and peculiar rights or facilities in the street, not common to citizens at large, in the nature of easements therein." <sup>2</sup> See, to the same effect, *Reining v. N. Y., L. & W. R. R. Co.* <sup>3</sup> That those easements are easements of light, air and access is settled by numerous decisions commencing with *Story v. N. Y. El. R. R. Co.* <sup>4</sup> Moreover, the existence of those easements in Park avenue is conceded in the prevailing Opinion in the *Muhlker* case, where it is said: "But that it" (the State) "possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improve-

<sup>1</sup> 173 N. Y. 556.

<sup>2</sup> 128 N. Y. 157.

<sup>3</sup> *Kane v. N. Y. El. R. R. Co.*,  
125 N. Y. 180.

<sup>4</sup> 90 N. Y. 122.



ment as resulted from the partial destruction of their easements of light, air, and access, we have no doubt."<sup>1</sup>

(2) That those easements are "property," within the meaning of the constitutional provision quoted, is settled by the same decisions. In the Kane case (*supra*), they are described as "constituting property, of which he" (the abutting owner) "cannot be deprived by the legislature or municipality, or by both combined, without compensation."<sup>2</sup> And, in a later case, the Court of Appeals said: "The abutting owner, by reason of his situation, has a kind of property in the public street for the purpose of giving to such land facilities of light, of air and of access from such street. . . . These easements were decided to be property and were protected by the Constitution from being taken without just compensation."<sup>3</sup>

(3) In searching, then, for an explanation of the constitutionality of the Act of 1892, the only conclusion consistent with such constitutionality is that the scheme of that statute did not involve the "taking" of any of those easements from the owners of property abutting on Park avenue, including Lewis, Fries and Muhlker. This leads to a consideration of what a "taking" of property consists in. That the physical effects of the maintenance of the structure and running of the trains in Park avenue were at least as inimical to the abutting owners' light, air and access, in, to, from and over

<sup>1</sup> 173 N. Y. 557.

<sup>2</sup> 125 N. Y. 180.

<sup>3</sup> *Bohm v. Met. El. R. Co.*, 129 N. Y. 587, 588.

the street, as were the physical effects of the maintenance and operation of the elevated, street railways' structures, to the same easements of the abutters upon the streets where the latter structures were erected, cannot be questioned. The steel viaduct, in front of the Lewis lot, was thirty-five feet in height by fifty-six feet in width, and over this were run between four hundred and five hundred trains every twenty-four hours, some of them by night, at a speed of from twenty to twenty-five miles per hour.<sup>1</sup>

The doctrine of a "taking," in a constitutional sense, of private property (easements, or *quasi* easements of light, air and access) of the abutters on the streets traversed by the elevated, street railways in the City of New York was established by judicial arguments, to which attention must be given in order to distinguish, if possible, between the plights of Story, Kane, Abendroth, etc., on the one hand, and the Park avenue abutters on the other.

In the Story case, which is judicially recognized as having created the three easements of an abutter on a public street, the doctrine of a "taking" of portions of these easements (private property) by the construction, maintenance and operation of the elevated railways in the streets was established by the arguments exclusively contained in the following quotations from the two Opinions:

DANFORTH, J., said: "In this case, it is found, by the trial court, in substance, that the structure

<sup>1</sup> 162 N. Y. 210, 211.

proposed by the defendant, and intended for the street opposite the plaintiffs' premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse, and thus work his injury. In doing this the defendant will take his property as much as if it took the tenement itself. Without air and light, it would be of little value."<sup>1</sup>

And TRACY, J., said: "The next question to be considered is, has the plaintiff's property been taken by the defendant, within the meaning of the Constitution of this State? To constitute such a taking, it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured or abridged by such appropriation."<sup>2</sup>

In the *Abendroth* case, the judicial argument was as follows: "These cases<sup>3</sup> also *hold* that, by the construction and operation of an elevated railroad in the street, in front of an owner's premises, his rights are 'taken for public use,' within the meaning of the Constitution."<sup>4</sup>

In the *Bohm* case,<sup>5</sup> is given a more esoteric view of the judicial argument on the point under consideration. It was there said: "The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence, when, under legislative and municipal au-

<sup>1</sup> 90 N. Y. 146.

<sup>2</sup> 90 N. Y. 168.

<sup>3</sup> *Story and Lehr*.

<sup>4</sup> 122 N. Y. 17.

<sup>5</sup> *Supra*.

thority, the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was taken, and any damage they sustained was indirect only, and, therefore, *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which, before the erection of the road, was worth, for instance, ten thousand dollars, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless, by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to, in order to render those who wrought such damage liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air and of access from such street. These rights . . . were called easements. . . . The easements were decided to be property, and protected by the Constitution from being taken without just compensation. It was *held*, that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent landowner, and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore,

not collectible from the defendants, was overcome."<sup>1</sup>

The peculiarities of the "taking" of private property, declared, by the Court of Appeals, to have been effected in the elevated, street railway cases, arose from the peculiarities of the property *held* to be taken. The "property" of the abutting owner, as he naturally supposed, was the land constituting his lot. He valued its proximity to the street, as affording him obvious facilities of light, air and access, upon the existence of which the possibility of his enjoying his lot (property) depended. If a portion of his lot should be taken for public use, this would necessarily be effected by an act done once for all, and consisting of an amotion of possession from him, and an occupation, and holding of possession, by some other than himself. The State, in taking the portion of his lot, would get, hold and use just what was taken. It is evidently impossible for the State, or any other person, by any acts performed in or over the street, in front of an abutter's lot, to take anything from the abutter in the sense above mentioned. Granting that an act is performed, in the street, interfering with the natural radiation of light upon, and flow of air towards the lot, and with the freedom of ingress to, and egress from the latter, the abutter, while keenly alive to the disadvantage, yet, being unlearned in the law, is not naturally disposed to contend that any of his property has been *taken*; the grievance which he alleges is *damage to his*

<sup>1</sup> 129 N. Y. 587.

property (lot). It is clear, that the agency working in the street does not get and cannot hold, use or enjoy any of the radiation of light, flow of air-currents or access to or from the lot, by its interference with these privileges of the abutter; it merely diminishes or destroys these privileges, and thereby, in the case of an elevated, street railway, it gets the opportunity to maintain the structure, and to run the trains of the road. Another striking peculiarity of the taking, discovered by the Court of Appeals to have been effected in the elevated, street railway cases, is that the act of taking is continuous and endless, as long as the structure is maintained and the trains are run. The taking, practically consisting in an interference with the abutter's said privileges, is performed as often as the interference occurs, *i. e.*, constantly.

Consideration of the foregoing judicial expositions of the meaning of the word "taken," in the above-quoted clause of the New York Constitution, as applied to the street easements of abutters on the routes of the elevated, street railways in the City of New York, necessitates the conclusion that private property of abutters on Park Avenue was taken, in a constitutional sense, by the Act of 1892, unless the long line of elevated, street railway cases are to be overruled; and the inevitable inference is that the Muhlker decision, affirming the constitutionality of that statute, conflicts with the series of uniform decisions, holding that an Act appropriating private property to the public use is unconstitutional, unless it provide for compensation,

to be made to the owners of the property taken.

Indeed, the dissenting Opinion in the Muhlker case (agreeing with the majority, that the Act of 1892 was constitutional) takes pains to announce a theory of constitutionality in pointed conflict with the series of uniform decisions last above referred to. It is said: "The claim that the Act of 1892 is unconstitutional cannot be sustained. If it be true that the defendants have no legal right to erect this steel viaduct . . . in front of the premises in question, the effect of the Act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of air, light and access have been invaded."<sup>1</sup> But, as has been seen, the elevated, street railway statutes were *held* to be constitutional, only after a careful examination made to ascertain whether they contained provision for compensation for any private property taken, and an arrival at the conclusion that they contained such provision. That the elevated street railroad corporation disregarded its creating statutes, in not making compensation, before it took the abutter's property, was a fact irrelevant to the question of the constitutionality of those statutes.

That the Muhlker decision, in denying a remedy to the abutters on Park avenue, conflicts with the elevated street railroad cases is a proposition which it seems impossible to disapprove. It is true that

<sup>1</sup> 173 N. Y. 560.

the prevailing Opinion, in the Muhlker case, observes that "the decisions in the elevated railroad cases are not in point. There, no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it" (the corporation) "took certain easements belonging to abutting owners, which it was compelled to compensate them for."<sup>1</sup>

When the argument contained in this quotation is analyzed, it is found to amount to this: that the Act of 1892 took what it took, or did what it did, for a public use, while the elevated, street railroad statutes took (in delegating the power to railroad corporations, to take) private property for *private* use! But the latter conclusion cannot, it is believed, be for a moment entertained. A legislative taking of private property for private use is an act unknown to Anglican and American law. That private property, taken by legislative authority for the purposes of a railroad corporation, is taken for public use by the State has long been the settled law of New York.<sup>2</sup>

The constitutionality of the Act having been once conceded, it became logically and legally impossible to allow any remedy to any person for alleged grievances accruing by the consummation of its scheme. Such constitutionality being conceded, the Muhlker case could not have been properly

<sup>1</sup> *Id.* 556.

<sup>2</sup> See per WOODRUFF, J., in *Matter of Townsend*, 39 N. Y. 173.



decided otherwise than it was, *i. e.*, in accordance with the prevailing Opinion. Such constitutionality being conceded, it became logically and legally necessary to overrule the Lewis decision; for, as is observed in the prevailing Opinion in the Muhlker case, the railroad company did not "become a trespasser because it obeyed the command of the" (valid) "Statute, which it could not refuse to obey, to operate its trains upon the structure which the State had built."<sup>1</sup>

It is of interest to inquire in what manner the conflict in the law, which is believed to have been discovered, and which has been asserted by a minority of the Court of Appeals to exist, arose.

When the People of the State of New York, in 1821, inserted in their Constitution the restriction upon the legislative exercise of the power of eminent domain, which has remained unchanged to this day, they, doubtless, referred to tangible "property," and to a "taking" the effect whereof is to install the taker in the same relations, in all respects, to the property taken, as were formerly occupied by the private owner, in other words to a taking whereby the taker gets just what is taken. At any rate, when, in 1850, the Radcliff case,<sup>2</sup> involving the power to alter the grade of a street, came before the Court of Appeals, this interpretation seems to have been accorded, and a distinction established between an impairment or destruction of rights or privileges appurtenant to tangible property, and an amotion of the *corpus*.

<sup>1</sup> 173 N. Y. 554.

<sup>2</sup> 4 N. Y. 105.

For the court, after quoting the constitutional prohibition, said: "They did not touch the testator's property."<sup>1</sup> And, although, "in digging away the bank in the site of the street, which was a natural support of the testator's land, a portion of his premises fell into the street, and he suffered damage,"<sup>2</sup> the result was *held* to be *damnum absque injuria*.

In 1863, in *People, et al., v. Kerr*,<sup>3</sup> the people, together with certain abutting owners, were before the Court of Appeals in opposition to the effort of surface, street railway companies, to lay their rails and run cars in certain streets in the City of New York; and the *damnum absque injuria* rule was again adhered to, "property" and "caption" receiving their normal construction. EMOTT, J., said: "We are brought to the simple question whether, in constructing and using a railway track, with city cars for passengers, through or over the streets enumerated in this complaint, the defendants will actually appropriate any property either of the City of New York, or of the individual plaintiffs. If property of the latter is taken without compensation, even for a public use, the statute is in conflict with the Constitution. . . . If the defendants will not take any property of the plaintiffs, in the construction or use of their railway, there is no other ground upon which the plaintiffs can complain of their proceedings, except that they will take property of the city un-

<sup>1</sup> *Id.* 198.

<sup>3</sup> 27 N. Y. 188.

<sup>2</sup> *Ibid.*

lawfully, because without compensation, and thus commit a nuisance by their appropriation of the highway. I have arrived at a conclusion adverse to the plaintiffs upon both these points."<sup>1</sup>

The abutters were again beaten, in the Court of Appeals, in a contest with the surface street railway companies, in 1872, in *Kellinger v. 42d Street R. R. Co.*,<sup>2</sup> where the same construction was given to the eminent domain clause of the Constitution as in the *Kerr* case. This is shown by the following extract from the Opinion of the court, wherein, however, some faint glimmerings of a subsequent development of the law dawn upon the view:

"The abutting owners have an easement in the street, in common with the whole People, to pass and repass, and also to have free access to their premises, but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action. There are expressions in some of the opinions, apparently favoring the idea that such an action may be maintained. It was said, in *Drake v. Hudson R. R. Co.*,<sup>3</sup> that, for contingent and consequential injuries, the parties aggrieved are not entitled to compensation as for property taken for public use, but that an action will lie for such injuries. The force of this remark is spent in limiting it to the statement that such injuries are not a taking of property within the meaning of the Constitution, without intending to define what injuries might be recovered for by ac-

<sup>1</sup> 27 N. Y. 195, 208.

<sup>2</sup> 7 Barb. 508.

<sup>3</sup> 50 N. Y. 206.

tion; and this view is confirmed by another portion of the same Opinion, in which it is said that adjoining owners have no exclusive right in the streets, but that all other citizens, including railroad companies, have equal rights, subject to the control of the public authorities. If this is so, there is no principle which will sustain an action for incidental injuries growing out of a lawful regulation by the public. When it is determined that a horse railroad is a public use of a street, the question is settled, that incidental inconveniences must be submitted to."<sup>1</sup>

A decade later (1882), in the Story case,<sup>2</sup> the volume of elevated railroad law was opened, and the surface, street railway cases were *distinguished*. The decision in that case, and in its sequels, has been recognized, in the Opinions of the Court of Appeals itself, as judicial (doubtless beneficent) legislation. In *Am. Bank Note Co. v. N. Y. El. R. R. Co.*,<sup>3</sup> it was said: "Now the elevated roads take no land from the abutter. They stand wholly upon land owned by the municipality, and no consequential damages flowing from the lawful corporate user could be recovered, but for the fact that some of them, though not all of them, have been, by the Story case, transformed from consequential injuries into invasions of property rights"; and the court expressly declined to "add a new brood of easements" (*i. e.*, in addition to those of light, air and access) "to those already awarded to the abut-

<sup>1</sup> 50 N. Y. 211.

<sup>2</sup> 129 N. Y. 271.

<sup>3</sup> 90 N. Y. 122.

ter, instead of leaving them where the Story case left them, the mere incidents of a lawful use."<sup>1</sup>

It was as true as it ever had been, that no (old-fashioned) "property" of the abutter was "taken" by the novel structures and operations in the street; but the court was *amazed* at the *quantum of detriment*, when "it was seen that abutting land which, before the erection of the road, was worth, for instance, \$10,000, might be reduced to a half or a quarter of that sum, or even rendered practically worthless, by reason of the building of the road."<sup>2</sup> Then, "it became *necessary* to ascertain if there were not some principle of law which could be resorted to, to render those who wrought such *damage* liable for their work."<sup>3</sup> The three new, private rights, in the street, "were called easements," and "were decided to be property," and "protected by the Constitution from being taken without just compensation."<sup>4</sup> Even yet, a difficulty remained. This newly created "property" was theoretically capable of being subjected to the milder influence of *damnum absque injuria*, as distinguished from the fatal "taking." Hence the final touch of the judicial hand. "The interference with these easements *became* a taking of them *pro tanto*. . . . For the purpose of permitting . . . a recovery, the taking of property had to be shown."<sup>5</sup>

In the Muhlker case, the power of the State to

<sup>1</sup> *Ibid.*

<sup>2</sup> 129 N. Y. 587.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> (That is, by the Court) 129 N. Y. 588.

change the grade of a street re-rose into prominence, in the mind of the majority, and appeared to imply a power to change the grade of a railroad in a street, without the imputation of inflicting other than indirect or consequential damage upon an abutting owner. "We still think, under the authority of *Radcliff's Executors v. Mayor, etc., of Brooklyn*,<sup>1</sup> and the other cases cited by Judge MARTIN in the Fries case, that the State had the power to make this improvement, as it did, without compensation to the abutting owners."<sup>2</sup>

"The argument has been pressed upon our attention with great ability that, as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. . . . Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case."<sup>3</sup>

Until two and two make five, it must be true that Lewis,' Fries' and Muhlker's property was taken for public use, if Story's, Lahr's and Kane's was.

<sup>1</sup> 4 N. Y. 195.

<sup>2</sup> 173 N. Y. 556.

<sup>3</sup> *Story v. N. Y. El. R. R. Co.*,

90 N. Y. 122, 177.

"That it" (the legislature) "possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of light, air and access, we have no doubt."<sup>1</sup>

"That . . . the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure, or the extent of the injury wrought upon property abutting thereon . . . is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be, that the vast property abutting on the streets of our great cities is held by so feeble a tenure."<sup>2</sup>

"Οὐ γὰρ πείσεις, οὐδ' ἦν πείσης."

ARISTOPHAN. PLUT.

<sup>1</sup> 173 N. Y. 557.

<sup>2</sup> 90 N. Y. 177.

## VIII.

### THE EXIGENCIES OF EMINENT DOMAIN (*Continued.*)

In the introduction to a work published in 1894, the decision of the Court of Appeals, in *Story v. N. Y. El. R. R. Co.*,<sup>1</sup> was referred to, by the writer, in the following manner: "Recent expressions of opinion, in the court which made the memorable decision, authorize the affirmation that it constituted a clear and notable instance of *judicial legislation*, a process which involves a measurable sacrifice of the authority of judicial precedent, or 'opposition to a statute making contrary provisions' (see 134 N. Y. 279, *n*), and has an inherent tendency to inaugurate a new line of adjudications. The new growth is likely to be more luxuriant, accordingly as the forensic enactment diverges more widely from the previously settled law, while its rapidity will be proportionate to the number of the subsidiary controversies, and the persistency of the litigants." <sup>2</sup>

The object of this study is, to trace the history of the law, in New York, relative to the right of an upper-story railroad corporation to erect and maintain a *station* over a public street, in front of an abutter's windows.

The exercise of that extraordinary dominion,

<sup>1</sup> 90 N. Y. 122 (1882).

<sup>2</sup> The Rise and Growth of Elevated Railroad Law, *Introduc.* (1894).



*dominium eminens*, which organized society—the State—at times necessarily exercises over the property of an individual, *i. e.*, the “taking” of such property for public use, is surrounded in this, and, generally, in every other State of the American Union, with restrictions imposed by the people, in their organic law, on their representatives, the legislature, uniformly substantially to the effect, “nor shall private property be taken for public use without just compensation.” This valued safeguard, thrown by the people around the property rights of the individual, protecting the latter from the people’s own agent sitting in the hall of legislation, is found, in New York, in a paragraph of the Constitution, sometimes termed the Bill of Rights, occurring in immediate association with that palladium of Anglo-Saxon liberty, “nor shall any person be deprived of life, liberty or property without due process of law.”<sup>1</sup>

The State may take the individual’s property for its own use, by direct assumption, or it may take for a public use by delegating power to a quasi-public corporation, as a railroad company. It has long been settled that private property thus taken under legislative authority by a railroad corporation, for its corporate purposes, is taken *by the State*, and *for public use*.<sup>2</sup> The private—quasi-public—corporation is the agent of the State in the actual, physical manucaption, though, from the point of view of the Constitution, the State

<sup>1</sup> N. Y. Const. art. 1, sec. 6.

<sup>2</sup> See *Matter of Townsend*, 39 N. Y. 173.

takes by enacting the statute delegating power, as aforesaid. The statute complies with the Constitution—makes “just compensation”—if it “provides a sure and convenient remedy by which the owner can subsequently coerce payment by legal proceedings. If such provision is not made, then the law making the appropriation is no better than blank paper.”<sup>1</sup> An unconstitutional law is a contradiction, *in terms*. “It is not a law,” but a mere *simulacrum—vox, et praeterea nil.*<sup>2</sup>

The primordial “taking,” in the exercise of eminent domain, involved a *getting* and a *keeping* of just what was taken; as when, in the olden time, a steam surface railroad company took a strip from a farm for its roadbed—“right of way.” It was early considered that the individual, in such a case, was not *justly compensated* by receiving, in money, merely the fair market value of the strip of land (property) taken. The *residue* of the sliced farm was, in general and presumably, not worth as much after the taking as before. Hence the courts established the principle that a “taking” was, hypothetically in the general case, and actually in the majority of cases, accompanied with another effect on the private owner called “damage.” He was *deprived* and *damaged; privatus, et damnificatus est*. Thus, by judicial decree, the requisite “just compensation” was *held* to comprise two elements: (a) payment for the property taken; (b) where

<sup>1</sup> See *Peo. ex rel. v. Hayden*, 6 Hill, 361; *Sage v. City of Brooklyn*, 89 N. Y. 195.

<sup>2</sup> See *Peo. v. Tiphaine*, 13 How. Pr. 74, 76.

not all taken, payment for the damage done by such taking to the residue or part not taken.<sup>1</sup>

Once the State of New York, using a municipality as its agent, altered, for the public use and benefit, by greatly lowering, the grade of a street, including the portion thereof upon which abutted the plaintiffs' testator's house; in fact, excavating a deep cavern, whereinto the soil of his lot largely fell. But the plaintiffs could not recover, for it was *held* that no *property* was *taken*. There remained the lot, comprising just as many superficial feet of the terrestrial area as before, and if its surface had a different slope since the landslide, the owner was left to reflect that the *individual is nothing in competition with society*. "A portion of his premises fell into the street, and he suffered *damage*"; but "they did not *touch* the testator's *property*." <sup>2</sup> So, it was, or became, *settled*, in New York, that the State can *damage* a man, for the benefit of the public, *ad libitum, gratis*, up to the limit of "taking" any of his property.

In 1863, the New York court of last resort emphasized the right or power of the legislature to damnify a man remedilessly, if only avoiding a *taking* of any of his *property*. It was in the matter of the surface, street railroads in New York city. The legislature having authorized the laying of rails on the surface of certain streets and the running of cars thereon, the "abutting owners" objected on

<sup>1</sup> See *Troy & Boston R. R. Co. v. Rad-Lee*, 13 Barb. 171; *Matter of Utica, cliff's Exrs. v. Mayor, etc., of etc., R. R. Co.*, 56 Barb. 464. <sup>2</sup> Per BRONSON, Ch. J., in *Rad-Lee*, 4 N. Y. 195, 198 (1850).

the only possible ground, namely, that the scheme involved a taking of their property; the actual fact being that they did not like to have the rails and travel in front of their doors, and considered that they were damaged thereby. The court discovered no private property *in the public streets*; and the doctrine of the absolute and unrestricted power of the State to damnify the individual, without remedy, found its application.<sup>1</sup>

Later, the legislature of New York passed acts,<sup>2</sup> in effect authorizing a railroad corporation to erect and maintain, on columns located in streets of the city of New York, a railroad *above* said streets, and to operate the same. These statutes were duly *held* to be constitutional, in the respect that they complied with the Constitution in providing "just compensation" for any private property, to be appropriated in the execution of their scheme.<sup>3</sup> This ruling was made on the ground, *inter alia*, that the acts in question made applicable the eminent domain provisions of the general railroad act of 1850 (ch. 140), which provided that, "in case any company formed under this act is unable to agree for the purchase of any *real estate* required for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act."<sup>4</sup> The prescribed "proceedings" ter-

<sup>1</sup> See *Peo. et al. v. Kerr*, 27 N. Y. 188; also, *Kellinger v. Forty-second St., etc., R. R. Co.*, 50 N. Y. 206.      <sup>2</sup> *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 354, 355.      <sup>3</sup> *Id.*, 50 N. Y. 206.      <sup>4</sup> § 13.

<sup>2</sup> L. 1866, ch. 697; L. 1867, ch. 489; L. 1875, ch. 606.

minated in an order of the Supreme Court, confirming the report of commissioners of appraisal appointed to determine the "just compensation" to be made to owners of private property taken; as to which, the act provided that, only on the recording of a certified copy of such order, and on the payment or deposit by the company of the sum to be paid as compensation, should the company be entitled to enter upon, take possession of, and use the land (property) taken for the purposes of its incorporation; and it was added, that "all real estate acquired by any company under and pursuant to the provisions of this act, for the purposes of its incorporation, shall be deemed to be acquired for public use."<sup>1</sup>

An elevated railroad corporation, however, took possession of the streets, erected and maintained its structure and operated the road (having secured the municipal consent), without paying anything to any abutter on its routes. The abutters did not own *the streets*; whence arose a judicial quandary. If the railroad corporation, purporting to have acted, and to be acting, under the *constitutional*, governing statutes, had *taken no property* of the owners of abutting lots, the latter were under the necessity of submitting, without compensation, to the serious inconvenience attending the novel system of locomotion, technically, if incoherently, termed by the law "consequential" damage. If the corporation had *taken property* of the abutters, it was too late to pay for it in the manner

<sup>1</sup> § 18.

required by the statute, which required payment to be made before possession assumed. The abutters vehemently contended that *property* had been taken from them, while the company, with equal insistence, argued that the former had only been lawfully, gratuitously damnified by the State.

The court *held* that private property in the public street (1) existed, and (2) had been taken; evolving, from the *thesaurus* of eternal justice, the definite number of three species of such property (never previously discerned)—facilities of light, air and access, in, *i. e.*, *above* the street, appurtenant or appendant to the abutting lot, which property the corporation was *held* to have “taken” away from the abutters (though it had not *got* it).<sup>1</sup> Later, the Court of Appeals explained:

“Now the elevated roads take no *land* from the abutter. They stand wholly upon land owned by the municipality, and no consequential damages flowing from the lawful corporate user could be recovered, but for the fact that some of them, but not all of them, have been, by the Story case, *transformed from consequential injuries* into invasions of property rights. To the extent of that transformation, the rule of damages must feel the effects of the change, but, beyond that, the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also into invasions of property, and add a new brood of easements to those already awarded to the abutter,

<sup>1</sup> Story case, 90 N. Y., *supra*.

instead of leaving them where the Story case left them, the mere incidents of a lawful use." <sup>1</sup> Thus was added another to many verifications of the assertion of DIGBY: "The word 'property' is used in so many senses as to be nearly useless for juristic purposes." <sup>2</sup>

The plight of the abutter, who had lost his now highly esteemed property before it had been created, and who could not insist on an enforcement of the railroad, eminent domain statute by resisting parting with possession until payment previously made, was considerably regarded by the courts; which devised or adopted the companion novelty of a solemn action in equity, brought by the abutter, against the railroad corporation, to procure a judgment of "injunction *nisi*," imperatively requiring the corporation to demolish its structure within a specified number of days *unless* it paid to the abutter what it ought normally to have paid to him before it took his air, etc.; which mandate was invariably accorded to the abutter. But "it is idle to talk about a company situated like this corporation *submitting* to an injunction and ceasing to operate its road through the avenue for a single day." <sup>3</sup>

The railroad act of 1850 providing, as stated, that, in case a company were unable to agree for the purchase of any real estate required for the purposes of its incorporation, it might acquire title

<sup>1</sup> *Am. Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 271 (1891).

<sup>2</sup> Per PECKHAM, J., in *Roberts v. N. Y. El. R. R. Co.*, 128 N. Y. 455, 475, 476 (1891).

<sup>3</sup> *History of Law of Real Prop.*, 4th ed., 300.

to the same, *in invitum*, viz.: by a special proceeding, popularly termed "condemnation," initiated by a petition to the Supreme Court for the appointment of commissioners of appraisal, and terminating with an order confirming their report as to value, upon payment of which the company was allowed to take possession, it was not only impossible for the elevated companies literally to avail themselves of the statute, because they had already taken, without payment, the "property" (real estate), title to which they needed to acquire; there was also the fact that the statute required the company, seeking to condemn property, to state, in its verified petition, that it was its intention in good faith to construct and finish a railroad from and to the places mentioned for that purpose in its articles of association; which the "elevated company" could not do, having constructed *a railroad*, and not intending to construct another. Nevertheless, after a prolonged legal struggle, it became *settled*, by decisions, that the condemnation statute could be *adapted* to the case of the elevated company, so as to enable it to proceed, as *actor*, *i. e.*, in an affirmative manner, against the property owners, to procure a judicial valuation of, and a title to, the fragments of easements appurtenant to their lots, which fragments the company had taken, destroyed. It was *held*, that the pendency of an equitable action, having for its practical object to secure to the plaintiff compensation for his "property"—light, air and access, in the street—taken by the company, was not a bar to the insti-



tution or maintenance of a special proceeding, by the company, for the "condemnation" of the same property. Thus the singular spectacle was repeatedly presented of twin litigations in different branches of one court, involving competing estimates of damages, one made by a judge, and the other by commissioners appointed by a judge. To this system of dual, contemporaneous, cumulative litigation the legal fraternity ultimately became reconciled. The injunction action was a "condemnation," with the parties reversed. "There is no doubt in this case, and I think no doubt in any case, that the injunction of a court of equity, and its alternative damages, are to be deemed a substitute for the ordinary proceedings for condemnation, with the practical difference only, that, in the one case, the company is the moving party, and, in the other, the owner."<sup>1</sup>

Reverting to the "condemnation" provisions of the general railroad act of 1850, which was framed with reference to steam, surface roads, a company might, as has been seen, institute proceedings for the condemnation of "any real estate required *for the purposes of its incorporation.*" And, inasmuch as, by § 28 of the same statute, every company formed under the statute had power "to erect and maintain all necessary and convenient buildings, *stations*, fixtures and machinery for the accommodation and use of their passengers, freight and business,"<sup>2</sup> there can be no doubt that *such* com-

<sup>1</sup> Am. Bank Note Co. v. N. Y. El. R. R. Co., 129 N. Y. 252.

<sup>2</sup> Subd. 8.

panies had the (delegated) power of eminent domain in respect of land needed for *stations*.

As to the history of the settlement of the question of the right of *elevated* railroad companies, in New York city, to erect and maintain, in the air, over the public streets, passenger *stations*, including stairways necessary to enable passengers to ascend to, and descend from, the tracks, it is to be observed that the rapid transit act of 1875 provided for commissioners, who were to frame articles of association for a corporation, to be formed under the act, which articles were to specify the extent of the rights and powers of the company, subject to the provisions of the statute.

A section of that statute read as follows:

"Every such corporation shall have the right to acquire and hold such real estate, or interest therein, as may be necessary to enable them to construct, maintain and operate the said railway or railways and such as may be necessary for *stations*, depots, engine houses, car houses, and machine shops, and, in case any such corporation cannot agree with the owner or owners of any such real estate, or of any interest therein, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act."<sup>1</sup>

The articles of association for a railroad company, framed by the rapid transit commissioners, declared that:

"Authority is given for construction of such supports, . . . landing places, *stations*, buildings,

<sup>1</sup> L. 1875, ch. 606, § 17.

platforms, stairways, . . . and such other requisite appliances, upon the route or routes, and in the locations determined by the commissioners, as shall be proper for the purpose of rapid transit railways, and as shall be necessary to meet the requirements of the traveling public." <sup>1</sup>

It is clear that the State's power of eminent domain was thus delegated to the elevated companies, in respect to their requirement of passenger *stations*, to render possible access to, and travel over their tracks. Perhaps it may be considered a fair question whether authority was thus given to take the singular, newly discovered "property," air, light, etc., of abutters, *in (above) the public street*, on which to erect *stations*, or whether they were confined to the right to acquire, *in invitum*, title to abutting lots, and build and maintain their stations and stairways on that more substantial foundation. Whatever may have been the true theory, the *law* became practically *settled* in favor of the former view, in various litigations instituted by and against the companies, wherein and whereby were liquidated, without distinction between the two classes, the damages constituting the value of the adventitious easements destroyed (private property taken) by the maintenance of, and operations on, the tracks over (above) the street, on the one hand, and by the maintenance of the *stations* and stairways over (above) the street, on the other.

In this manner was gradually developed a unique

<sup>1</sup> Art. 7, subd. 52.

judicial code of law, applicable to a particular exigency in a limited locality, involving a novel application of the exercise of the power of eminent domain, uniform in its operation on the acquisition of title to destroyed easements, whether destroyed by tracks and trains, or by *stations*, over (above) the street; and whereunder millions of dollars changed hands as the consideration of the title deeds of light, air and access, executed and delivered to the carriers.

In 1892, the New York legislature passed the act <sup>1</sup> to regulate, improve and enlarge Park avenue, above One Hundred and Sixty-sixth street, in the city of New York, and for the elevation of the structure of the New York and Harlem Railroad Company, the tracks of which had been laid in that avenue; the act concededly containing no provision for any compensation to owners of land abutting on said avenue for property belonging to them, if any, to be taken by such improvement and elevation of railroad structure.

According to certain judicial decisions, in *Bloodgood v. Mohawk, etc., R. R. Co.*,<sup>2</sup> *Peo. ex rel. v. Hayden*,<sup>3</sup> and *Sage v. City of Brooklyn*,<sup>4</sup> made, respectively, in 1837, 1844 and 1882, this statute would have been "unconstitutional and void" and "no better than blank paper," if, by a proper construction, it should be *held* to appropriate private property to public use. But the act was repeatedly and emphatically declared to be "valid," "constitu-

<sup>1</sup> Ch. 339.

<sup>2</sup> 18 Wend. 9.

<sup>3</sup> 6 Hill, 361.

<sup>4</sup> 89 N. Y. 195

tional," and even "not unconstitutional,"<sup>1</sup> although it was expressly conceded to the abutters that the scheme of the statute, which involved the erection, in, *i. e.*, over (above) the street, of a lofty steel viaduct, at certain points thirty-five feet in height, fifty-six feet in width, and over which were run between four hundred and five hundred trains every twenty-four hours, some of them by night, at a speed of from twenty to twenty-five miles per hour, caused "the partial destruction" (taking) "of their easements" (property) in the street "of air, light and access."<sup>2</sup> One of the reasons why this was thus, without which the decision might have been thought to be inconsistent, was—that the "detriment to the abutters" caused by the N. Y. C. & H. R. R. Co., lessee, by taking their easements, was "*damnum absque injuria*."<sup>3</sup> Another consideration was that the government built the structure for the purpose of effecting a "great public improvement."<sup>4</sup> True, the greatness of the improvement may, by some, be considered to be, in a measure, irrelevant to the question at issue; and similarly as to an "improvement," for the right of the government to effect a public work, though it should turn out a public *detriment*, can probably not be impugned. Therefore, and inasmuch as the "government" cannot be successfully, at least not clearly, distinguished from the "State," the situation exhibited in the last quotation would seem to be one

<sup>1</sup> 169 N. Y. 277, 282, 288; 173 N. Y. 556 (1901, 1903).

<sup>2</sup> 173 N. Y. 557.

<sup>3</sup> 169 N. Y. 277.

<sup>4</sup> 175 N. Y. 370.

where the State takes private property *without* just compensation, for the *reason* that the property is taken for public use.<sup>1</sup>

In the Lewis case,<sup>2</sup> which involved the Park avenue improvement, the principles involved, or evolved, were conditioned upon an embarrassing division of responsibility, viz.: between the State and the N. Y. & H. R. R. Co.; for "the State created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control, with no right on the part of the defendants to let or hinder."<sup>3</sup> Defendant, on the other hand, "simply paid one-half of the expense by command of the statute, and, hence, under compulsion of *law*";<sup>4</sup> and if any higher authority, than that, can be imagined on the subject of taking private property for public use without compensation, it must be—the Constitution. The State, then, being apparently immune from "compensation," when acting through "a board of experts," it was considered, *per contra*, as regarded the defendants, that "when they commenced to *use* the steel viaduct, they started a new trespass upon the rights of the abutting owners,"<sup>5</sup> the old trespass not being definitely located. The dilemma of the defendants at this juncture excites, at least, attention. They had "paid one-half the expense," thus becoming *particeps constructionis*; and the statute "*directed* the defendants

<sup>1</sup> Const., Art. 1, § 6.

<sup>2</sup> 169 N. Y. 202 (1900).

<sup>3</sup> 162 N. Y. 226.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.* 227.

to operate their trains on the structure when completed." <sup>1</sup> Presumably, they must trespass, or go out of business. The latter alternative would invite a fate, the dread of every sentient and dissentient being. Defendant could not "refuse, when the viaduct was constructed, to operate its trains upon it, even if it wanted to, without subjecting itself to a *sentence of death* at the hands of the State." <sup>2</sup> This reduced the dilemma to trespass or death—trespass, itself a violation of law, or death for violation of law (refusal to trespass). The plot thickens; in fact, is becoming somewhat mixed. If there be any other instance of a law directing a violation of law, it may be looked for among the imperial rescripts during the period of decline of the Roman empire. Clearly, it was cheaper to violate law, *simpliciter*, than to violate law, and die, into the bargain. The trespass-horn was therefore seized; but, this trespass being a taking of property, the matter of "compensation" remained to be adjusted, and the device availed of was to incur, but not submit to, a judgment of injunction (*nisi*), although the way was also open, by precedent, of *ex post facto* "condemnation." As the "taking of property" consisted exclusively in running railroad trains, it was impossible (in view of the rapidity of their motion) to observe the maxim, to "pay as you go"; whence a commutative sentence, to pay a lump sum, once for all, as compensation for having run (taken), and future running (taking), estimated by an adaptation of

<sup>1</sup> *Ibid.*

<sup>2</sup> 169 N. Y. 275.

the Northampton mortality tables, until the indefinite termination of the corporate existence. Whether this sum was ever paid to Lewis is not known; but, shortly after the solution of this enigma, it was manfully announced that the Lewis decision was "in error";<sup>1</sup> and thus it became *settled* that the company did not owe Lewis a cent for anything; so that, if they did not come down, and pay up, before the settlement, the stockholders escaped an imminent sequestration of a dividend; all of which illustrates the proverb, that he who fights and *runs* (away) may *live* (to fight another day). This may not be strictly apposite, but it is submitted that it is adaptable.

The situation now appeared to portend a stage of evolution of the code or treatise of light, air and access, definitely ratified, and approximately co-ordinated, consummated, completed and confirmed; the whole being to the effect that the elevated railroad abutters were to be paid, while the Park avenue abutters—not the public—were to be damnified. But it was not to be entirely so. The resultant mingling of professional disappointment, and abutting relief, arose out of a little matter of a "*station*"—an erection particularly objected to by one Dolan, an abutter, who, undaunted by the wreck of the matter of the reckless hopes of Fries, Muhler and Lewis the Second, stood firm "*amidst the war of elements,*" relentlessly pursued his injunction *nisi* to the last resort, and won out.

<sup>1</sup> *Muhler v. N. Y. & H. R. R. Co.*, 173 N. Y. 549.



*Dolan v. N. Y. & H. R. R. Co.*,<sup>1</sup> is entertaining, as illustrative of the minute differentiation characteristic of the evolution of the modern jurisprudence. Its study will usefully proceed by attention, first, to the principal facts involved, and then to the material differences between them and those in the *Fries* and *Muhlker* cases; whereby *Dolan* secured compensation for a part of the property taken from him, while the two former had no cause of action.

*Dolan's* house and lot are located on Park avenue, in the borough of Manhattan, city of New York, abutting, as regards the upper stories of his building, upon or against the elevated station of defendant's viaduct road, constructed over the intersection of that avenue and One Hundred and Twenty-fifth street. The *station* is upon the viaduct structure, which is widened, at this part, so as to provide a suitable platform, by means whereof passengers may enter and alight from the trains; and reached by stairways, situated above the street, and descending to the surface of the latter. *Dolan* commenced in equity, encouraged by innumerable precedents in the New York courts, seeking to procure a judgment of injunction *nisi*, viz.: perpetually enjoining and restraining defendant from continuing to maintain its elevated tracks *and* station, and running its trains in front of his windows, unless it should pay a sum of money, compensation for certain past, and commutation for perpetual future, trespasses (taking), in consideration of

<sup>1</sup> 175 N. Y. 367 (June, 1903).

receiving from plaintiff a satisfaction-piece, and a deed of part of his light, air and access.

The trial court accorded to plaintiff the relief prayed for—an injunction, with an alternative necessity of paying duly estimated “fee” and “rental” damages; but inasmuch as the money, payment of which was so provided for, by the trial court, included damages adjudged to have accrued by reason of the *running of trains* on the viaduct, it was imperative to reverse the judgment and order a new trial, in deference to the maxim, *stare decisis*, for, in *Muhlker v. N. Y. & H. R. R. Co.*,<sup>1</sup> and *Fries v. N. Y. & H. R. R. Co.*,<sup>2</sup> it had been *settled* that, neither for the existence of the viaduct, nor for running trains thereover, were the Park avenue abutters entitled to any compensation, the theory of a “new trespass, started” when defendant commenced to use the steel viaduct,<sup>3</sup> under legislative compulsion, having been recalled and rejected.

Inasmuch as Lewis, Fries and Muhlker, severally, were not affected or afflicted by the presence of a *station*, in *facie domi*, in front of their upper-story windows, there obviously remained, for ultimate decision in this (Dolan) case, the cognate question “whether the plaintiff can recover damages by reason of the construction and maintenance of the defendants’ *depot*.”<sup>4</sup> Although, as expressly announced in the highest court’s opinion, the judgment for Dolan, rendered below, “must be reversed upon the authority” of the Fries and Muhlker de-

<sup>1</sup> 173 N. Y. 549.

<sup>2</sup> 169 N. Y. 270.

<sup>3</sup> 162 N. Y. 227.

<sup>4</sup> 175 N. Y. 369.

cisions, the occasion was properly availed of to expound anew the logical processes which had led to the conclusion, that, in respect of the maintenance of the viaduct, and the running of trains thereon, the Park avenue abutters were obliged to submit to "the partial destruction of their easements of light, air and access," without compensation or doubt.<sup>1</sup> Upon a summation of the *res gestæ*, it appeared that, "prior to" 1892, the defendants had acquired the right to maintain and operate their railroad, in the avenue in question, in a subway or cut bounded on either side by walls of masonry. This cut had to be filled up, and the surface paved, for the evident purpose of facilitating longitudinal and transverse travel. "This was a public improvement effected through a governmental agency, over which the defendants were given no voice or power to control the operation of the board."<sup>2</sup> Consequently, defendants could operate their trains on the viaduct, without making any compensation. The preliminaries passed, the subject of *stations* is reached.

The act of 1892 "authorized and permitted" the defendants, "at their election, to erect station houses on both sides of the railroad at one Hundred and Twenty-fifth street with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-fifth street."<sup>3</sup> Here, it is plain, was no compulsion of law, such as had yielded a

<sup>1</sup> 173 N. Y. 557.

<sup>2</sup> Page 370.

<sup>3</sup> *Id.*

happy immunity in the running of trains. The extra-cautious might suspect that, under this authority and permission, there might lurk authority and permission to pay for property taken in availing of the permit. In addition, the express mention of an "election" might be viewed as equivalent to notice that the railroad company had an option to have a road without any stations, or depots, which, though not usually exercised, might be *held* to carry with it legal liability for error in neglecting the opportunity. This situation, however, was apparently ameliorated, and the statute expressly amended, by an enactment of 1896, "in which the defendants were not only authorized but *directed* to erect and maintain such stations, specifically specifying the size, place and character of the structure."<sup>1</sup> The unprofessional observer might be excused for inferring that, by the imposition of this *direction* of the legislature, stations were, under the late precedent, brought down, or rather up, to the same level as the running of trains—to be governed by the same principles, as concerns compensation to abutters. But, by referring to the Muhlker opinion, it is found that defendant, in running its trains over the viaduct, "obeyed the *command* of the statute," which it could not refuse to obey,<sup>2</sup> whereas here, defendant was merely "*directed* to erect and maintain such stations, specifically specifying," etc.; so that the technical, but well established, distinction between manda-

<sup>1</sup> *Ib.*<sup>2</sup> 173 N. Y. 554.

tory and directory statutes may be supposed to negative the validity of the inference suggested.

The final decision of the Dolan case, however, did not turn upon this point at all, but on a "controlling distinction," whereby the "decisions in the Fries and Muhlker cases have no application." <sup>1</sup>

It appeared that, "in this case, the government required the defendants to provide suitable and proper facilities to enable their patrons to safely and conveniently enter and alight from their trains." <sup>2</sup> Moreover, "a railroad corporation, in accepting a charter from the State, impliedly undertakes to afford reasonable and proper facilities for the transportation of passengers and freight, and if it neglects it may be compelled to discharge its duty in this regard." <sup>3</sup> Whereby it appears that the railroad company was not only subject to a governmental requirement to furnish a station, but was under a contract to do so, and liable to an action for specific performance in this regard.

What might be considered a collateral circumstance existed in the fact that, under the general railroad law, "the construction and maintenance of depots is committed to the judgment of the railroad commissioners, who are empowered to direct as to the station houses." <sup>4</sup> Now, the general railroad law, being primarily framed with reference to surface roads, the commissioners, in prescribing stations for such a road, evidently stood upon solid ground, whereas in the case in hand,

<sup>1</sup> 175 N. Y. 370.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

they might be viewed as up in the air. But, by the amendment of 1896, the legislature superseded the commissioners, and the situation was not different from that which would be presented if the latter had required a depot at some other point, *e. g.*, on *terra firma*. Now, if, in the absence of the legislation of 1896, and had the road been a surface road, the commissioners had required a depot, it would become the duty of the railroad company to acquire additional lands, and pay therefor. So, in the case under consideration, if the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, the defendants should pay therefor, as the station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required, by the government, to be constructed by the railroad companies under their implied contract.

*"Peace brooded o'er the hushed domain."*

DOMETT.

## IX.

### THE ABENDROTH CASE.<sup>1</sup>

#### 1. *The case below, and a juridical retrospect.*

The complaint, in the action of William P. Abendroth against Manhattan Railway Company and The New York Elevated Railroad Company, which was brought in the Superior Court of the City of New York, was verified December 28th, 1883. Therein plaintiff, complaining, respectfully showed to the court: "That he is and has been since the second of January, 1865, the owner in fee simple, and is and has been seized and possessed of all that certain lot, piece or parcel of land, together with the four-story brick store thereon erected, known as No. 280 Pearl street, situate, lying and being on the southerly side of Pearl street, in the second ward of the City of New York . . . and as such owner was and is seized in fee to the centre of said Pearl street, immediately in front of said premises, and was and is seized and possessed of an easement in said Pearl street, to wit: that said street should be kept open for the use and purposes of a public street, without obstruction, detriment or damage to said plaintiff's access, ventilation, light and full and

<sup>1</sup> See Appendix II, p. 32, *post*.

free enjoyment of his said premises" ; alleged other facts tending to establish an equitable cause of action ; and prayed "that the defendants, and each of them, may be *perpetually enjoined and restrained* from further obstructing or incumbering said Pearl street in front of plaintiff's said premises by maintaining, continuing, operating or adding to the structure and railroad aforesaid, and that they be directed and compelled to remove the same, and that the amount of damage sustained *and to be sustained* by plaintiff by reason of the matters and things hereinbefore alleged, or any of them, be ascertained, and that he have judgment against the defendants therefor."

The action appears, therefore, to have been "brought in equity," "for the purpose of compelling the defendants to remove their structure" ;<sup>1</sup> the plaintiff, according to a long sanctioned practice,<sup>2</sup> adding, to his demand of an injunction, a demand of judgment for the damages due him for the commission of the alleged wrong up to the time of the commencement of the action, and, further, for the damages to become due for the anticipated continuance of such commission up to the time of the trial.

The *answers* of the defendants contained various denials of allegations of the complaint, and alleged statutory and municipal authority for the railway ; absolute ownership of the street by the City of

<sup>1</sup> See 122 N. Y. 18.

*per* GRAY, J., in *Lynch v. Met. El.*

<sup>2</sup> See *per* EARL, J., in *Mad. Ave. R. Co.*, 129 N. Y. 274.  
Ch. v. Oliver St. Ch., 73 N. Y. 95;



New York; and acquiescence on the part of the plaintiff.

The "trial court"—Special Term—found, as matters of fact, that defendant, The New York Elevated Railroad Company, was, by statutes, authorized to construct, maintain and operate the railroad mentioned in the complaint, and that the defendant, Manhattan Railway Company, was lawfully in possession of and operating the same; that plaintiff was, and for over twenty years last past had been, the owner in fee simple absolute, of the lot mentioned in the complaint, together with the tenements, hereditaments and appurtenances thereunto belonging; that the map referred to in the "description" contained in the deed to plaintiff, shows the said lot to be bounded on the north by the south side of Pearl street and the side-line measurements of said lot, given in said deed, to extend southerly from said south side-line of said street; that Pearl (formerly Queen) street, in front of said lot, was a very ancient street opened under the Dutch government; that the Dutch colonists were governed by the Civil Law, whereunder highways belonged to the Sovereign absolutely, "and there is no right in the adjacent owner to the soil, either during their use, or upon a discontinuance"; that "these royalties and absolute rights in respect to the highways and lands granted by the Dutch ground-briefs, subsequently passed to and became vested in the Mayor, Aldermen and Commonalty of the City of New York"; that the building on the plaintiff's premises, erected upwards

of fifty years ago, was a four-story brick building, with doors and a window on the first floor, and three windows on each of the three floors above, facing on Pearl street; that "plaintiff's premises herein abut on Pearl street, and that his only means of street access to the same is, and for more than forty years last past has been by Pearl street"; that, during plaintiff's ownership of his said premises, he has paid assessments as well as taxes to the said city; that "the said railroad structure does not interfere with the air of plaintiff's building, or with access thereto, in any substantial degree"; that "the said structure, which the defendants have and do maintain, has and does fill a large portion of the space of said street in front of plaintiff's said premises and seriously impairs his light; that said structure is permanent"; that "said engines emit smoke, gas, steam and cinders, which at times have and do enter the plaintiff's premises through his doors and windows, and causes him injury"; that the "trains make some noise caused by the jar of the wheels at the joint of the rails, and also by the exhaust of the engine, but the trucks are furnished with paper wheels, and the exhaust pipes with perforated inverted cones, which are the best practicable appliances known for preventing such noise. The said locomotives are furnished with a sieve to arrest sparks and cinders, which is the best practicable appliance known for such purposes"; that "by reason of the facts aforesaid, the rental value of plaintiff's premises has been seriously dimin-

ished," and "the plaintiff's property has been and is permanently damaged, and its value lessened" ; and, *as a conclusion of law*, that "the plaintiff has no private property, or property rights in Pearl street."

The Special Term, accordingly, rendered judgment dismissing the complaint. At General Term, this judgment was reversed, and a new trial ordered. The defendants then appealed to the Court of Appeals, stipulating under Code Civ. Pro., § 191, subd. 1. The appeal of plaintiff to the General Term was heard exclusively on the exceptions to the findings, and to the refusals to find, of the Special Term; the "Case on Appeal," in that appeal, and in defendants' appeal, containing none of the evidence.

In the Opinion of the Special Term, it was *held*, in effect, that the evidence showed that the structure of defendants' road, in Pearl street, materially interfered with the *light* of plaintiff's premises, and that the maintenance of the structure and operation of the road were a serious injury to plaintiff's property; that defendant, The New York Elevated Railroad Company, was authorized by the legislature, and by the city, to construct and operate its road through said street; that Pearl street, in front of plaintiff's premises, was in use as a public road or street before the *conquest* of New Netherlands by the English, and the Dutch government was the absolute owner thereof; that the owners of property abutting on this street, at the time of the *conquest* of the city by the English,

had no right or property in the street, as distinct from the other inhabitants of the City; that this absolute ownership of the street passed to the English crown, and thence, either by the Dongan Charter, in 1686, to the City, or, at the Revolution, to the State, and thence to the City under the Act of 1793; that, unless it appears that plaintiff has "acquired some interest *in the street* since that time," none of his property has been taken by the defendants; that, under authority given by the Dongan Charter, the City adopted and dedicated the street as a public street; that, "by such *dedication*, an abutting owner, as distinct from the public, acquired no easement in the street itself" ; that no one can acquire title by *prescription* in a public street or highway; that, so far as *public* interests in a street or highway are concerned, the Legislature has supreme control, may change one kind of public use into another, and dispose of the public interest in any way; that plaintiff has no interest or property in Pearl street, in front of his premises, that has been appropriated or used by the defendants; who are, therefore, entitled to judgment.

The distinguishing feature of this Opinion of the Special Term, is, that the Court directs its attention exclusively to "property" *in the street*. The argument of the Opinion may be thus epitomized: plaintiff must recover, if at all, on the ground that his "property" has been "taken" without "compensation" ; the only property taken by the maintenance and operation of defendants' road is

property *in the street*; plaintiff has no property in the street; therefore, none of his property has been taken; therefore, he cannot recover.

Two Opinions were written at the General Term; *in the former* of which, it was *held*, in effect, that it was immaterial, whether plaintiff had "any interest in the fee of Pearl street in front of and adjacent to his premises, or any easement in the street"; that plaintiff would be entitled to recover, not only if it appeared that there had been a violation of the Constitutional prohibition against taking property for a public use without compensation,<sup>1</sup> but also if it appeared that there had been a violation of the Constitutional provision, that no person shall be "deprived of life, liberty or property without due process of law";<sup>2</sup> that "due process of law" means, not an Act of the Legislature but, law in its regular course of administration through courts of justice; that, from the finding—that defendants' engines emitted smoke, gas, steam and cinders, which entered plaintiff's *premises* through his doors and windows, and caused him injury, and that thereby the rental value of his *premises* had been seriously diminished, and his property permanently damaged, and its value lessened—it followed that plaintiff's property had been taken without compensation, *and* that he had been deprived of his property without due process of law; that "one's right to enjoy property free from smoke, gas, steam, cinders, etc., is property; that authority from the Legislature to the defendants

<sup>1</sup> N. Y. Const., Art. 1, § 6.

<sup>2</sup> *Ib.*

to do these things could not be inferred from the corporate charter; that, if the "assessments" found to have been paid were for street purposes, plaintiff would have an easement of light, air and access to the street; and "this easement has been taken from him without due process of law and without compensation"; that the Rapid Transit Act of 1875, required defendant to compensate a person whose *land* is subjected to such an easement as the right to "throw dust and ashes" thereon, in providing<sup>1</sup> that it should have "the right to acquire and hold such real estate, or any interest therein, as may be necessary to enable it to construct, maintain and operate its railway; that the judgment should be reversed.

The radical distinction between this, the former of the two Opinions written at the General Term, and the Opinion of the Special Term, is, that, instead of looking for property of plaintiff *in the street*, it declares the question of the existence of such property to be immaterial, and addresses itself, except in a *dictum*, exclusively to plaintiff's property *in his premises*. The argument of this Opinion may be thus epitomized:—plaintiff's property *in his premises* includes the right to immunity from the propulsion thereon of smoke, gas, steam and cinders, to an extent lessening the value of the premises; the violation of this right, under legislative authority, would be an infringement of each of the clauses of the Constitution cited; but the Legislature granted no such authority, for

(a) none can be inferred from the corporate charter, and (b) the latter contains an affirmative provision looking to the acquisition, by the company, of an easement *in plaintiff's premises*, namely, the right to such propulsion, on payment.

Although the Opinion pointedly calls attention to a distinction between two clauses of the N. Y. Constitution—that relating to the taking of property for a public use, and that relating to deprivation of property without due process of law—each clause is *held* to have been violated.

*The latter* of the two Opinions, written at the General Term, is diffuse and rambling; and it is only by close study that the tenor of an argument can be discovered. It *held*, in effect, that the finding of the trial-court, as to the absolute ownership of the street by the City, “was supported by competent and sufficient evidence,” the only condition attached to such ownership being one implied by the provision in the Dongan Charter, that the street should be for the public use of the Mayor, Aldermen and Commonalty of the City and travelers there,—which provision, however, created “no private easement or property right” in the owner of any abutting lot; that, assuming plaintiff and defendants to be owners or occupants of adjoining premises in a city, defendants were bound so to use their premises as not to inflict “any substantial injury” on plaintiff; that, if such injury were inflicted, the fact that the necessities of defendants’ business required the infliction, or that they exercised due care to prevent this mischief,

would not be an excuse; that the propulsion of smoke, gas, steam, cinders, etc., on plaintiff's premises, to the extent found, was not a necessary incident of defendants' business, and therefore the Legislature could not have contemplated such act, in authorizing the construction and maintenance of the railroad; that, if it were necessary for the decision of the case, there would be no hesitation in holding that the Legislature was prohibited, by each of the two clauses of the Constitution above cited, from authorizing such injury; that the finding as to payment of assessments must be presumed to be relevant, and therefore such assessments must be deemed to have been made for the improvement of Pearl street; that such payments implied a contract with plaintiff, as abutting owner, that he should be "secure in his right to use and enjoy the street, with all the improvements and advantages to the creation of which he had specially contributed."

This, the latter of the two Opinions written at the General Term, sustains plaintiff's action on each of two distinct grounds. One ground was that defendants had violated a common-law property-right of plaintiff, *in his premises*, as an adjoining owner; the existence of legislative authority to do the acts committed being denied. The other ground was declared to be an extension or imitation of the doctrine of the Story case—a contract with the city, implied in the compulsory payment of assessments for street improvements, creating easements *in the street*, namely,



that the same should be devoted only to street uses.

Chief Justice SEDGWICK concurred "with both judges, delivering opinions, that the property of plaintiff was taken without compensation."

Defendants' appeal, from the General Term order reversing the judgment which had been rendered in their favor, and directing a new trial, was argued before the Second Division of the Court of Appeals, January 20th, 1890, and decided October 7th of that year. During this period of eight and one-half months, the learned Second Division, doubtless, had time to deliberate with care upon the difficult question or questions involved in the case.

Two theories, to support the right of plaintiff to recover, were open to the consideration of the Second Division of the highest court; each of which theories involved an assent to the proposition that the plaintiff owned *the premises* described in the complaint, *i. e.*, the lot of land abutting on Pearl street, and bounded, on the north, by the south side-line of that street.

According to one theory, defendants had committed and were proposing to continue to commit an *injury* to plaintiff's property *in said premises*.

According to the other theory, plaintiff owned property *in Pearl street*, and defendants had committed, and were proposing to continue to commit, an *injury* to *that property*.

A strong inducement to attempt to work out a decision,—which was to be in plaintiff's favor,—

on the line of the latter theory, was found (1) in a certain fact of the case, (2) in a notable and well-established principle of law, and (3) in at least three prominent and typical, direct precedents. The *fact* was,—the conceded one,—that the Legislature had authorized the construction, maintenance and operation of an elevated steam railroad in Pearl street.

The *principle of law* was that private *damnum*, resulting from an act authorized by statute, is *absque injuria*, subject always to Constitutional limitations. This doctrine was and is settled as law in the State of New York, having been repeatedly referred to by the courts. In *Bellinger v. R. R. Co.*,<sup>1</sup> DENIO, J., said: "If one chooses of his own authority to interfere with a water course, even upon his own land, he, as a general rule, does it at his peril, as respects other riparian owners above or below. But the rule is different where one acts under the authority of law. There he has the sanction of the State for what he does, and, unless he commits a fault *in the manner* of doing it, he is completely justified."<sup>2</sup> In *Radcliff v. Mayor*,<sup>3</sup> BRONSON, Ch. J., said: "But a man may do many things under a lawful authority or in his own land, which may result in an injury" (damage?) "to the property of others, without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever

<sup>1</sup> 23 N. Y. 42.

<sup>3</sup> 4 N. Y. 195.

<sup>2</sup> Page 47.

consequences may follow." <sup>1</sup> In *Cogswell v. R. R. Co.*,<sup>2</sup> ANDREWS, J., said, of the Radcliff case: "The case has been frequently followed, and its authority completely established by repeated decisions in this State. It is an application of a principle well settled, that private interests must yield to the public welfare, but the case carries to the utmost limit the *right of the legislature*, for public reasons, to *interfere with private property* to the injury" (damage?) "of the owner, without making compensation." <sup>3</sup>

The *three precedents* were the Story case,<sup>4</sup> the Lahr case,<sup>5</sup> and the N. Y. Nat. Exch. Bank case.<sup>6</sup>

In the Story case, each of the two judges who wrote the prevailing Opinions addressed himself, with the greatest degree of assiduity, to the task of establishing, as a premiss in his argument, the proposition that the plaintiff owned *property in the street* in which the elevated railroad had been constructed. Those judges also seem to have assumed that it was suitable, if not essential, in demonstrating the *existence* of *such* property, to account for its *genesis*, and to do so upon principles which had obtained recognition in the Anglo-Saxon jurisprudence. This exigence was deemed satisfied when the judicial vision detected, lurking in a covenant in a deed, from the City of New York, as proprietor, in plaintiff's chain of title,

<sup>1</sup> *Id.* p. 200.

<sup>2</sup> 103 N. Y. 10.

<sup>3</sup> Page 19.

<sup>4</sup> 90 N. Y. 122.

<sup>5</sup> 104 N. Y. 268.

<sup>6</sup> 108 N. Y. 660; below, 53 N. Y. Sup'r Ct. R. 511.

the origin of a right, *in the street*, of light, air and access, constituting an "incorporeal hereditament,"<sup>1</sup> which "became at once appurtenant to the lot,"<sup>2</sup> which thereupon became the "dominant," the open way or street being "the servient tenement."<sup>3</sup> . . . "But what is the extent of this *easement*?"<sup>4</sup> After a laborious demonstration of plaintiff's ownership of this *incorporeal* hereditament in the street, the judge, who wrote the former of the two prevailing Opinions, surprises the reader by saying: "I also think the plaintiff may stand upon his first proposition, that he *owns the fee* of the street,"<sup>5</sup>—whether this *stand* was to be taken upon the street, in its entire breadth, or only up to the *filum viæ*, not being stated. Finally, the same judge delivered himself of a *dictum* involving the theory of an inviolable *contract*.<sup>6</sup>

In the latter of the two prevailing Opinions in the same (the Story) case, plaintiff's property *in the street* is thus described: "such servitude constitutes a private easement in the bed of the street, attached to the lots abutting thereon, and passed to the plaintiff as the owner of such lots. That an easement is property . . . cannot be doubted."<sup>7</sup>

In the Lahr case, the court rotated its equatorial for the purpose of discovering private property of the plaintiff *in Amity street*; and, no deed

<sup>1</sup> 90 N. Y. 145.

<sup>2</sup> *Ib.*

<sup>3</sup> *Ib.*

<sup>4</sup> *Ib.*

<sup>5</sup> 90 N. Y. 160.

<sup>6</sup> *Ib.*

<sup>7</sup> 90 N. Y. 167.

with suitable covenants appearing, a nebulous implication of a covenant, having the requisite genetic fertility, was espied in a statute,—the Act of 1813,—of which the Court says: “We are of the opinion that no legal difference exists, with reference to the *interest* acquired by abutting owners in a public street, between that afforded by a title conferred under such a deed as Story had, or (*sic*) that acquired through a series of *mesne* conveyances from the original owner, whose property had been taken by proceedings in *invitum* instituted by the municipality, under a public statute to acquire land for street purposes, which statute provided that the land thus taken should be held ‘in trust, nevertheless, that the same be appropriated and kept open for or as part of a public street . . . forever, in like manner as the other public streets . . . in the said city are, and of right ought to be.’ ”<sup>1</sup> The Court next expatiates upon a *dictum*, to the effect that such proceedings constituted a *contract* between the public and “all persons entitled to be heard on the proceeding”<sup>2</sup>—these persons, apparently, including *non-abutters*, who were assessed—that the street shall be used only for street purposes,<sup>3</sup> which contract could not be impaired by State legislation;<sup>4</sup> and then adds that, “even if this were not so,” the *covenant*, implied from the Act of 1813, and the proceedings taken thereunder,<sup>5</sup> made with

<sup>1</sup> 104 N. Y. 289.<sup>2</sup> *Id.* 290.<sup>3</sup> *Id.* 291.<sup>4</sup> *Id.* 292.<sup>5</sup> *Id.* 291.

abutting owners among others, and running with the land, was "effectual to create an easement over the lands" composing the street, which "easement constitutes property." <sup>1</sup>

In the N. Y. Nat. Exch. Bank case, the General Term of the Superior Court of the City of New York *held* that plaintiff, as lessee of a lot on the S. W. corner of College Place and Chambers street, in that city, had an *easement in those streets*, saying: "The easement in question had its *origin* in a *cession* by the Trinity Church Corporation of the streets named for street purposes. In this respect the case at bar is identical with the case of *Glover v. Manhattan Railway Co.*, 51 Sup'r Ct., 1." <sup>2</sup> In the *Glover* case, so referred to, it had been said, in the Opinion of the same court, at Special Term: "The fee of Greenwich street in front of plaintiff's property passed to the City of New York by the deed from the Church corporation dated 1761, but by the conveyance the property conveyed was to be held by the city as a public street forever. The city accepted the conveyance subject to this condition, and this, I think, gave the owner of the adjoining property the *right* and privilege of having *the street* kept open forever as such, and the Court of Appeals in the case of *Story v. The N. Y. Elevated R. R. Company* has decided that such a right was 'an incorporeal hereditament. It became at once appurtenant to the lot and formed an integral part of the estate in it,' and constituted 'a perpetual incumbrance upon the land burdened

<sup>1</sup> *Id.* 292.

<sup>2</sup> 53 N. Y. Sup'r Ct. R. 512.

with it. . . . The lot became the dominant and the open way or street the servient tenement.'"<sup>1</sup> The N. Y. Nat. Exch. Bank case was affirmed in the Court of Appeals, without an Opinion.<sup>2</sup>

The purpose of the allusion to these three typical precedents, which preceded the Abendroth case, will have been effected if attention has been pointedly drawn to the emphasis laid by the Court, in each, on the circumstances of ownership, by the plaintiff, of *property in the street*, as a condition of allowing the action to be maintained.

It may not render this article amenable to the description, "*De rebus omnibus et quibusdam aliis*," to take one further step, of retrogression, into juridical history, and inquire into the reason for the selection, by the Court of Appeals, in the Story case, of this *ratio decidendi*. Embalmed in the volumes of reports of the Opinions of the highest Court of the State, were certain decisions in what are known as the surface, or horse, street-railroad cases, among which, *People v. Kerr*,<sup>3</sup> and *Kellinger v. R. R. Co.*,<sup>4</sup> were and are prominent.

*People v. Kerr*, decided in 1863, was an action brought, by the People of the State, and certain individuals, owners of lots fronting on Seventh Avenue and other streets in the City of New York, to enjoin Kerr and others from constructing a surface railroad in those streets, and to enjoin the Mayor, etc., the corporate defendant, from assenting to or furthering such construction.

<sup>1</sup> 51 N. Y. Sup'r Ct. R. 14.

<sup>2</sup> 108 N. Y. 660.

<sup>3</sup> 27 N. Y. 88.

<sup>4</sup> 50 N. Y. 208.

As CHURCH, Ch. J., observed, in the Kellinger case, "it is not quite clear as to what was intended to be decided" (in *People v. Kerr*) "relative to the rights of abutting owners."<sup>1</sup> But an attempt will be made, by collating certain expressions contained in the Opinions of EMOTT and WRIGHT, JJ., with the expressions contained in the Opinion of CHURCH, Ch. J., in the Kellinger case, to ascertain, as nearly as may be, the substance of the street horse-railroad decisions.

Said EMOTT, J., in the former case: "We are brought to the simple question whether, in constructing and using a railway track with city cars for passengers, through or over the streets enumerated in the complaint, the defendants will actually appropriate any property, either of the City of New York or of the individual plaintiffs. If *property of the latter* is taken without compensation, even for a public use, the statute is in conflict with the Constitution; and the remedy sought by them in this action is obviously just and appropriate to prevent a direct invasion of their own rights."<sup>2</sup> Again: "The power of the Legislature to create or confer such a franchise as the exclusive right to transport persons or property by railways through these streets, and to receive tolls therefor, will not now be questioned. I have endeavored to show why I do *not consider* that the grant of the exercise of such a privilege involves *taking* or imposing a new burden upon *any property*, either of individuals or of the City of New

<sup>1</sup> See 50 *Id.*, on p. 200.

<sup>2</sup> 27 N. Y. 195.



York." <sup>1</sup> WRIGHT, J., said: "The plaintiffs, other than the people, have no property, estate or interest in the land forming the bed of the streets in front of their respective premises, to be protected by the Constitutional limitation upon the right of eminent domain." <sup>2</sup>

Kellinger v. R. R. Co., decided in 1872, was an action brought by the owner of premises fronting on Union Square, in the City of New York, in the street in front of which premises, the defendant had laid its tracks. The complaint alleged that one of the tracks was so near to the sidewalk as to prevent complete enjoyment of plaintiff's use of his premises; that, by reason of such proximity, the value of said premises was impaired and its rental diminished; that defendant had not obtained plaintiff's consent, or instituted proceedings to acquire title. Wherefore, plaintiff asked judgment for damages, and for an injunction restraining defendant from using such track. The defendant demurred to the complaint, as not stating facts sufficient to constitute a cause of action; and the demurrer was sustained by the Court of Appeals. CHURCH, Ch. J., after noting that the City of New York had "acquired, by grant, dedication or confiscation, the title in fee to the land on which the streets are laid," which title was held "in trust for *public* use, and such as was acquired under the Act of 1813 is by that Act expressly declared to be held in trust for the purpose of main-

<sup>1</sup> *Id.* 208.

<sup>2</sup> *Id.* 210.

taining public streets,"<sup>1</sup> says: "The fee being in the public, the legislative authority can lawfully consent to modify, regulate or *enlarge* its use for the benefit of the public. If these positions are sound, the corporeal rights of property of the plaintiff have not been impaired. *Neither his property nor any right of property* has been *taken* from him or injured, and his injuries are referable to that class of incidental disadvantages to which he is subjected, resulting from the lawful exercise of the absolute power of control vested in the State, in connection with the title to the fee of the land. This, I think, necessarily results from the principles determined in *The People v. Kerr*. The abutting owners have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises, but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action. . . . When it is determined that a horse-railroad is a *public use* of the street, the question is settled, that incidental inconveniences must be submitted to. They become merged in the superior interest of the public."<sup>2</sup>

The same facts existed in the *Kerr* case, as to ownership of the land of the streets, as were noted by CHURCH, Ch. J., in the *Kellinger* case;<sup>3</sup> namely, all the streets concerned, were either opened under the act of 1813, or "ceded to the City of New York in fee upon trust to be kept open as public

<sup>1</sup> 50 N. Y. 208, 209.

<sup>2</sup> *Id.* 210, 211.

<sup>3</sup> *Supra.*

streets . . . forever” :<sup>1</sup> that is, the fee of the streets, as the expression goes, was, in each case, in the City of New York. In each case, the railroad had been constructed and was operated, in the streets, pursuant to statutory authority. In each case, the court was bound to *hold*, in obedience to the doctrine of the Radcliff and of the Bellinger case—declaring damages resulting from the exercise of a power conferred by statute to be *absque injuria*—that the property-owners could not recover; *unless* the exercise, in question, involved the taking of private property, and thus the Constitutional provision, “nor shall private property be taken for public use without just compensation,”<sup>2</sup> had been violated. In each case, the Court *held* against the property-owners, thereby necessarily implying, if not expressing, that this *Constitutional provision had not been violated*. The only doubt was and is, as to the elements of the judicial syllogism which terminated in *this negation* as its immediate conclusion; *i. e.*, whether the reason why such violation had not occurred, and, therefore, the property-owners were not entitled to recover, was that they *had no property* which could possibly be “taken” by the act of defendant, or that, admitting the existence of property capable of being “taken,” the acts of defendant were not of a quality—of a degree of appropriateness—essential to elevate them to the dignity of a “taking.” WRIGHT, J., indeed, says, in the

<sup>1</sup> Per EMOTT, J., 27 N. Y. 199,  
200.

<sup>2</sup> N. Y. Const., Art. 1, § 6.

Kerr case: "The plaintiffs, other than the People, have no property, estate or interest, *in the land forming the bed of the streets* in front of their respective premises, *to be protected* by the Constitutional limitation upon the right of eminent domain" ;<sup>1</sup> but this remark admits of an interpretation which would make the "protection" mentioned refer to either (1) protection against a surface railroad, or (2) protection against *any* public use.

At any rate, when the prevailing judges, in the Story case, had made up their minds that plaintiff was to be allowed to recover, they found themselves confronted with the problem of framing a theory for such recovery which should (1) not contravene the *damnum absque injuria* rule established in the Radcliff and Bellinger cases, and (2) not overrule the Kerr and Kellinger cases, wherein that rule had been applied. The device hit upon was to indulge in the subtle process of "distinguishment." Nowhere, in the Opinions of EMOTT and WRIGHT, JJ., in the Kerr case, or in the Opinion of CHURCH, Ch. J., in the Kellinger case, is a distinction taken between a *public* use and a *street-use* of a street. Indeed, as has been stated, the last-named judge explicitly declares that the question was "settled" when it was determined that the horse-railroad concerned was a "public use of the street." But it was an intellectual possibility to conceive of the consistency of this proposition with one that the question would not necessarily be *settled* when it was de-

<sup>1</sup> 27 N. Y. 210.

terminated that a railroad, *other than* a horse- or surface-railroad, was such a public use. And so we find, in the former of the two prevailing Opinions, in the Story case, the defensive protest: "The street railway cases are in no respect in conflict with this doctrine. The railroads in those cases were surface roads" ;<sup>1</sup> though, in the dissenting Opinion, it was said: "The decisions in those two cases were in no degree based upon the fact that the railroads were constructed upon the surface of the streets."<sup>2</sup> The first step, then, in the Story case, was for the court to *decree* that the *elevated railroad*, to the use of which, in addition to, and *pari passu* with, prior uses, the Legislature had *enacted* that the street should be devoted, was not a *street-use*.

It is of interest to note, after the lapse of a decade, one of the judges of the highest court frankly admitting that, in the Story case, the People of the State of New York, represented in the court, did enact as follows, by saying: "Where a public use authorized by law takes no *land* of an individual, but merely affects him by its proximity, the necessary annoyances of that perfectly lawful use furnish no basis for damages. Now, the elevated roads take no land from the abutter. They stand wholly upon land owned by the municipality, and no *consequential damages* flowing from the lawful corporate user could be recovered but for the fact that *some of them*, though not all of them, *have been by the Story case transformed*

<sup>1</sup> 90 N. Y. 174.

<sup>2</sup> *Id.* 189.

from consequential injuries into invasions of property rights. To the extent of that transformation the rule of damages must feel the effects of the change, but, beyond that, the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also" (why not?) "into invasions of property, and add a NEW BROOD OF EASEMENTS to those already *awarded* to the abutter, instead of leaving them where the Story case left them, the mere incidents of a lawful use." <sup>1</sup>

PECKHAM, J., in a recent opinion, intimates that the prevailing judges, in the Story case, were actuated by a more active *animus* than is ordinarily attributed to *incubation*, where he describes the judicial amazement at the *quantum of detriment* capable of being inflicted under the Radcliff doctrine, and describes with nonchalance the influence of logic and precedent, pervading the determined judicial search, in the historic arsenal of legal principles, for some Mons Meg which might be remounted and trained on the "invader," <sup>2</sup> of the "quasi-easements." The learned Judge says:

"The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence when under legislative and municipal authority the railroad struc-

<sup>1</sup> Per FINCH, J., in *Am. Bank Note Co. v. The N. Y. El. R. Co.*, 129 N. Y. 252.

<sup>2</sup> 99 N. Y. 170.

ture was built, it was supposed by many there was no liability to abutting owners because no land of theirs was taken and any damage they sustained was indirect only and *damnum absque injuria*. When the Courts acquired possession of the question, and it was seen that abutting land which before the erection of the road was worth, for instance, \$10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, *it became necessary* to ascertain if there were not some principle of law which could be resorted to in order to *render those who wrought such damage liable* for their work. It has now been *decided* that although the land itself was not taken, yet the abutting owner, by reason of his situation, had *a kind of property* in the public street for the purpose of giving to such land facilities of light, of air and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were *called* easements and were *held* to be appurtenant to the land which fronted on the public street. These easements were *decided* to be property and were protected by the Constitution from being taken without just compensation. It was *held* that the defendants by the erection of their structure and the operation of their trains interfered with the beneficial enjoyment of these easements by the adjacent land owner and in law took a portion of them. By *this mode of reasoning* the difficulty of regarding the whole damage done to the adjacent owner as consequential only

(because none of his property was taken) and therefore not collectible from the defendants was overcome. The *interference* with these easements *became a taking* of them *pro tanto* and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendants' road. For the purpose of permitting such a recovery the taking of property *had to be shown.*"<sup>1</sup> The italics are not judicial.

But, in view of the Radcliff doctrine, this re-script, merely ordaining the new *public* use to be a *non-street* use, would have been innocuous to Story's defendant, unless it were possible to show that such legislative devotion to a non-street use brought the case *within the exception* to that doctrine, by violating the Constitutional restriction on the taking of private property. Thus the problem became, in its new phase—to show how a non-street use necessarily *took* Story's property, as distinguished from merely *damaging* it. If the only "property" of Story, discovered, were his ownership of his *abutting lot*, an adjudication that his property was necessarily "taken" by a public use *of the street* would, it was seen, leave no region, at all, for the Radcliff doctrine to operate, or else a region incapable of any philosophic or practical *limitation*: naught could be asserted but a varying degree or amount of detriment to such lot; and at

<sup>1</sup> *Somers v. Met. El. R. Co.*, 129 N. Y. 252.



what point could the Legislature descry the legend, illumined by a beam from the Constitution: "Thus far, and no farther" ?

Hence the happy thought, *to fix the street-boundary* as the line of crucial demarcation. Private property on the lot-side of this rubicon was to be within the clutches of the Radcliff rule; private property on the street-side, under the *ægis* of the Constitution; *and thus arose, apparently, the conviction of a necessity for demonstrating the ownership, by Story, of "property" in the street!*

The critical may exclaim, after reflection, that there is yet a screw loose in this judicial Minerva (*—pace Whately—*) since, admitting (1) that plaintiff had *property in the street*, and (2) that an elevated railroad was a non-street use of the street, *non-constat* that *such* use would "take" any even of *such* property, within the meaning of the Constitution:—why would it do more than cause an "incidental" or "consequential," non-actionable, "disadvantage" to *such* property? It being admittedly possible, in legal theory, where the only "property" assumed to exist is *land*, that conduct, adverse to the property-owners' interests, involving the subservance of a public use, should assume either of two aspects, namely, either (1) a "taking," carrying with it a necessity for compensation, or (2) a mere inconveniencing, precluding such necessity,—whence, it may be inquired, this sacredness of "property" *in the street*, which negatives the possibility where this "kind of" property is discovered, of the assumption, by such conduct,

of the latter aspect, elevating the incorporeal hereditament into a region of security superior to that of the land—the abutting lot—for whose benefit, alone, the appurtenance exists?

On page 146 of the Report,<sup>1</sup> the *dictum de omni et de nullo* is utilized as follows:

*Minor premiss.*—It is found by the trial court, that the structure, proposed by defendant for the street opposite plaintiff's premises, would cause an actual *diminution* of light, depreciate the value of plaintiff's warehouse, and thus work his injury.

*Conclusion.*—In doing this thing, the defendant will take his property, as much as if it took the tenement itself!

*Major premiss.*—Without air and light it would be of little value:—

a syllogism convertible into the form of one in the first mood of the first figure, wherein the allusion to depreciation in value of the warehouse is irrelevant, under the Radcliff rule; that to the working of an injury marks a *petitio principii*; while the fallacy contained in the word “diminution” (of light) suggests the use of a *fourth* term.

On page 168 of the same Report, it is said:

“The next question to be considered is, has the plaintiff's property been taken by the defendant, within the meaning of the Constitution of this State? To constitute such a taking it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or

<sup>1</sup> 90 N. Y.

privilege is destroyed, injured or abridged by such appropriation."

Here, the judicial mind, contents itself with portraying what have just been *held* to be the origin of the plaintiff's property-rights and the physical result of the defendant's acts and announcing as the answer to the "question to be considered," that this "*is sufficient*," to constitute a taking. The attentive reader will not fail to note the glamour thrown over the asseveration, by describing *the street* as "*property appropriated* to the public use," in the very sentence in which is propounded the question whether the *plaintiff's* "property" has been *taken*. At the opening of the sentence, the reader's understanding is in a state of equilibration, on the question propounded; but as the well-rounded period closes, it is unconsciously assumed that, as "property" had been "appropriated," the "plaintiff's property," just demonstrated to exist or inhere in the former, has, with it, suffered the fatal ravishment!

No *rational* ground, whereon can rest the proposition, that private property in a street, such as it was discovered that Story owned, is *taken* by the maintenance of an elevated railroad in such street, has been exposed<sup>1</sup> in any of the judicial or other literature relating to the elevated railroads in New York City; and it may be, that, if any such ground exist, it can be apprehended only as a sequel of the following, or similar reflections:

A normal "taking" implies that the thing taken

<sup>1</sup> Written in 1892.

is *got* by the taker, and, where such thing is material, consists in a deprivation, by physical force, of the physical custody. The act, in respect of chattels, is performed daily, in endless iteration, in the effectuation of commercial exchanges, and exhibits itself with undue frequency in the sphere of crimes.

A total destruction would obviously be undistinguishable, in its privative effect upon the owner of the property, from a normal *taking*; wherefore, no system of jurisprudence could permit a destroyer, *in toto*, to escape any liability attached to a taking, on a plea that he secured only a collateral advantage, as distinguished from an *acquisition* of the property.

*Total* destruction—not attempting, now, to speak with the precision appropriate to physical science—is predicable of a chattel; but land is totally incapable of destruction. The law is concerned, not so much with the land as with the property<sup>1</sup> therein; and the essence of such property is the right of possession, which, however, is not literal or manual, as it may be in the case of a chattel, but consists, rather, in the exclusion of others from entry. Hence, as to land, the analogue of a “taking,” in the normal concept, and of its equivalent, a total destruction, of a chattel, is total deprivation of possession, in the sense of ouster, and total and permanent exclusion from entry, of the owner; as where the State, through a railroad company, as

<sup>1</sup> Proprietorship—*dominium*.

its agent or delegate, takes and fences off a strip of land, from a farm, for a roadbed.

Divest the deprivation of possession of land of its *totality*; suppose, for example, an inconvenience to the owner's possession to be caused by unconscionable sonorous atmospheric undulations generated on the land of another,—though this may practically accomplish a *pro tanto* ouster,—and one enters forthwith the realm of the principle, so firmly established in the State of New York,—“the right of the Legislature, for public reasons, to interfere with private property to the injury of the owner, without making compensation.”

In the leading case of *Eaton v. Boston, Concord & Montreal R. R. Co.*,<sup>1</sup> the court disparages the doctrine, which has been above suggested, that *totality of amotion* is essential, to justify a conclusion that “property” is “taken,” within the constitutional meaning of those terms, saying: “To constitute a ‘taking of property,’ it seems to have sometimes been held necessary that there should be ‘an exclusive appropriation,’ ‘a total assumption of possession,’ ‘a complete ouster,’ an absolute or total conversion of the entire property, ‘a taking of the property altogether.’ These views seem to us to be founded on a misconception of the meaning of the term ‘property,’ as used in the various State constitutions.” And the court declares itself in favor of a definition of “property,” in the relation indicated, which corresponds substantially to the most philosophic of the eight dif-

<sup>1</sup> 51 N. H. 504.

ferent acceptations of the term, enumerated by AUSTIN, in his forty-seventh lecture on Jurisprudence, saying, in effect, that land is not *property*, but the *subject* of property; that the right of indefinite user is an essential element of absolute property, without which absolute property can have no existence, and that whatever physical interference annuls this right *takes property*, although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature.<sup>1</sup>

The Opinion of SMITH, J., in the New Hampshire case, referred to, has been widely cited and commended. A prominent writer says of it: "The whole opinion is a grateful and refreshing recognition of the rights of private owners of property."<sup>2</sup> MILLS says: "The decision is one of marked ability."<sup>3</sup> "But the most satisfactory and best considered case which can be found in the books upon this subject, which examines, classifies and analyzes nearly all the cases, and in the conclusions of which I wholly agree, is that of *Eaton v. B. & M. R. R. Co.*, 51 N. H., 504 to 535."<sup>4</sup>

Doubtless, these praises are deserved by the Opinion of the New Hampshire Court, viewed from a rational standpoint; but, for the New York jurist, how to reconcile its positions with the "right of the Legislature for public reasons, to interfere with private property to the injury of the owner,

<sup>1</sup> 51 N. H. 511, 512.

<sup>4</sup> Per CHRISTIANCY, J., in *Grand*

<sup>2</sup> SEDGWICK, *Interp. Stat. & Const.* *Rapids Booming Co. v. Jarvis*, 30 Law, 2d ed., p. 458, note.

*Mich.* 308, 320.

<sup>3</sup> *Em. Domain*, § 188.

without making compensation,"<sup>1</sup> is a problem, not included in the species postulate. The position taken by the Supreme Court of New Hampshire is the more remarkable, in view of the circumstance that the Constitution of that State seems to invite the legislature to indulge its appropriative proclivities in respect of private property, by a provision that "no part of a man's property shall be taken from him or applied to public uses, without his own consent or that of the representative body of the people."<sup>2</sup>

There is rare occasion for an exercise, by the State, of its *dominium eminens* over personal property; for such of that species of property as might be required for a public use being generally fungible—capable of duplication—can be purchased in the market with funds derived from taxation. But, assuming that it were requisite, in the case of a chattel, to destroy a separable *part*, for a public use, the part destroyed might with plausibility be held, in favor of the owner, to be property taken, in view of the physical divisibility, and by the application of the doctrine of *totality* of destruction to such *part*. Easements, being inseparable from the particular portions of the terrestrial surface which, severally, they benefit and burden, partake of the infungibility of land, and may require to be specifically affected for a public use. Being incorporeal, they are incapable of physical partition; so that there is no room for the application of the doctrine, just suggested in

<sup>1</sup> 103 N. Y. 19.

<sup>2</sup> Const. 1792, part 1, art. 12.

respect of a chattel, that property is taken by a (total) destruction of a *part*, in contradistinction to the doctrine of an impairment of quality and value.

Where an easement of light, air or access is a burden upon the free natural expanse, a *total* deprivation of enjoyment is essential, as is a total exclusion from entry in the case of land, to give any rational support to an assertion of a "taking," in those jurisdictions where the Radcliff principle prevails. But this proposition may require modification in the presence and in consequence of an exceptional quality or condition of the servient tenement.

Now, Story's easements, discovered in 1882, were in " 'a way between two rows of houses'—a street" ;<sup>1</sup> which was a portion of the terrestrial surface primarily devoted to the public use of public travel. Those easements were, therefore, intrinsically residual only, and capable of being described as a right to so much of the unlimited, natural radiance of light, flow of air and freedom of access as remained after all true street-uses were subserved. From this description sprang, necessarily, a negative aspect of Story's right—the easements became describable as a right to *insist on the absence* of non-street uses, diminutive of the residuum. It may be conceded that an elevated railroad, in a city street, encroaches on the easements of light, air and access, appurtenant to an abutting lot, more than did the street-uses which

<sup>1</sup> 90 N. Y. 158.



were in 1813, *and* of right ought to be in 1882—the interval between those years having witnessed the introduction of street horse-railroads into the category.

The essence of the “property” discovered was, thus, a specific negation; and a negation admits of no degrees. To antagonize it, by an affirmation ever so feeble, is to cause it to vanish utterly. To *annihilate* the discovered easements would, it has been admitted, involve a taking of property; and so we find ourselves again in search of a boundary line in a narrowed territory (the street), beyond which line the Legislature could not pass, without making just compensation. The hopelessness of such a search may be deemed a justification of importing an analogy between an extinguishment of the *essential quality* of incorporeal property, and a total destruction of a *separable part* of a chattel; “property” being deemed to be *taken* in each case.

An earnest effort has thus been made to discern, *in the circumstance that Story's property consisted in the negation of liability of an incorporeal residuum to further abridgement*, a rational justification of the doctrine that the detriment which he suffered, in respect of that nondescript property, by the maintenance of an elevated railroad in the street, was caused by a true taking of it; with what success is to be judged.

The alternative to the vindication of the logic is a conviction that the Story dogma of caption, like the exclusion, by the same case, of an elevated railroad from the class of street-uses, must remain

subject to characterization as an arbitrary—*arbitrium boni viri*, it may be—judicial fiat.

It may be remarked, for the sake of completeness in the hypotheses, that the reports of judicial opinions exhibit allusions to "invasion," made in discussions of the rights of property-owners, as affected by elevated or other railroads in streets, which, by their pointed finality seem to imply that, "property" of the abutter being once legally posited *in the street*, further ratiocination, in support of the theory of a "taking," is rendered unnecessary by the establishment of an identity of *loci*, justifying the employment of this appellative.

Thus, TRACY, J., exclaims, in his Opinion in the Story case: "We think such a structure closes the street *pro tanto* and thus directly *invades* the plaintiff's easement in the street,"<sup>1</sup>—the qualities of an *indirect* invasion being left to surmise; FINCH, J., in the American Bank Note Company case,<sup>2</sup> speaks of transforming consequential injuries into "*invasions* of property"; EMOTT, J., in *People v. Kerr*,<sup>3</sup> says: "If property of the latter" (the individual plaintiffs) "*is taken* without compensation, even for a public use, the remedy sought by them in this action is obviously just and appropriate to prevent a direct *invasion* of their own rights";<sup>4</sup> GREY, J., in *Shepard v. Man. R. Co.*,<sup>5</sup> says that "allegations of damage from trespass, or from the *invasion* of the plaintiff's rights, are nec-

<sup>1</sup> 90 N. Y. 170.

<sup>2</sup> *Supra*.

<sup>3</sup> *Supra*.

<sup>4</sup> 27 N. Y. 195.

<sup>5</sup> 43 N. Y. S. R. 117.

essary"; and in the same spirit is the passage from the opinion of SELDEN, J., in the Williams case<sup>1</sup>: "If the railway *encroaches* in any degree upon the plaintiff's *proprietary rights*, then it is clear that the constitutional inhibition, which forbids the taking of private property for public use without just compensation, applies to the case."

An *invading* army may be said to "take," *ex vi termini*, the hostile territory; but the impossibility of exerting physical force upon non-matter—incorporeal hereditaments—though held to inhere in the street which is the theatre of operation of the tort affecting them, reduces these allusions to the rank of dexterous brandishments of a military metaphor, and, in so doing, negatives the existence of an apology, of the character suggested, for making a logical halt, upon the discovery of "property" of the abutter, *in the street*.

In the manner described, did the prevailing judges, in the Story case, measurably fulfil the obscure and timid prophecy, uttered a score of years previously, in their court, recorded informally, in a reporter's note,<sup>2</sup> and which has been so little noticed: "BALCOM and MARVIN, JJ., suggested that, independent of the public right in streets, whether acquired by dedication or confiscation, and of any naked fee which might remain in the original owner, with the possible ultimate right of reverter, there *might be* a private right in the owners adjoining the street to have free access to their premises held under the original propri-

<sup>1</sup> 16 N. Y. 100.

<sup>2</sup> 27 N. Y., on p. 215.

etor of the tract embracing the street, of which such owner could not be deprived by the assent or surrender of the public or of the general owner of the fee of the street, or both, without compensation for his individual *interest in the street or easement*. This they said to preclude the conclusion, if such were possible, that any such interest could be supposed to have been disregarded. They saw no such question in this case" (singular non-vision!), "and were, therefore, for affirmance."

## 2. *Before the Second Division.*

The Opinion of the Second Division commences with a display of precision and order, wherein is described the promise of a mode, of treating the difficult subject presented, as nearly scientific as the composite nature of Anglican jurisprudence—that child of reason and slave of precedent—permits.

At the threshold, are announced, in numbered clauses, "the principal questions involved in this appeal" ; and the enumeration is immediately followed by a declaration of the sort of person whom "the term 'abutting owner' will be used in this *judgment* to denote."

One of the main purposes of a logical definition is to avoid ambiguity in the discussion wherein the term defined is employed; <sup>1</sup> and nothing could be more auspicious than the adoption of a device tending to exclude such an element from the approaching delivery.

<sup>1</sup> Whately, *Logic*; Book 3, § 10.

The definition in question, being the only one in the Opinion, is contained in the following sentence:

"The term 'abutting owner' will be used in this *judgment* to denote a person having land bounded on the side of a public street and having no title or estate in its bed or soil, and no interests or private rights in the street except such as are incident to lots so situated."

The term here defined must be conceded to be an awkward expression, at the best, it being indisputable that the owner does not habitually engage in the operation of abutting; but the use of it should be regarded as abundantly justified, by authority, having the sanction of the example of the Court of Appeals, in the Kellinger case,<sup>1</sup> the Story case,<sup>2</sup> the Mahady case,<sup>3</sup> the Lahr case,<sup>4</sup> the Pond case,<sup>5</sup> the Powers case,<sup>6</sup> and others. This circumstance, however, of frequent prior use, might be supposed to imply that the term had already acquired a definite legal meaning, and thus to obviate the necessity of a definition, unless, indeed, it were proposed to use it, in this judgment, in a new sense.

An examination of the cases just cited shows that the term had been uniformly employed generically, namely, to designate the owner of a lot which might be said to "*front on a street*," without any exclusion on account of the existence or

<sup>1</sup> 50 N. Y. 209.

<sup>2</sup> 90 N. Y. 172, 186.

<sup>3</sup> 91 N. Y. 153.

<sup>4</sup> 104 N. Y. 288.

<sup>5</sup> 112 N. Y. 188.

<sup>6</sup> 120 N. Y. 178.

absence of proprietary relations to the land on which the street is maintained; and an attempt must now be made to discover in what new acceptance, if any, it is promised that the term "will be used in this judgment."

The "land," which the abutting owner, of this judgment, has, is "bounded on the side of a street," a very embarrassing location for a lot, if it be exclusively bounded in this manner, for such a lot would either consist of a mathematical line, and so be too thin for building purposes, or else envelop and comprise the entire superficies of the planet.

The statement of what the abutting owner, of this judgment, *has* is followed by a more elaborate exhibit of what he has *not*; and his lack is qualified, in part, by an exception. He has *not*, in the first place, any "*title or estate* in its bed or soil." The term, *title*, is thus defined by a recent and talented writer: "The *evidence* by which a person proves himself to be the owner of a thing is called his title. My title to the books now on my table consists in possession; the fact that they lie there is evidence that they belong to me, and the title is good enough, unless some person can produce better evidence to the contrary. If I own a sum of Consols, my title consists in the entry of my name in a book at the Bank of England."<sup>1</sup> As respects *estate*, a more venerable author explains that "an *estate* in lands, tenements and hereditaments signifies such *interest* as the tenant has

<sup>1</sup> Raleigh on Property, Ox., 1890, p. 12.

therein. . . . It is called, in Latin, *status*; it signifying the condition or circumstance in which the *owner* stands with regard to his property.”<sup>1</sup> The particle, *or*, occurring, in the definition, between *title* and *estate*, must be assumed to be employed in its true alternative sense, and not as indicating synonymy between those terms; for otherwise we should be imputing a capability of imitating the conveyancer, who recklessly grants, bargains, sells, aliens, remises, releases, conveys and confirms all the estate, right, title, interest, property, possession, claim and demand of the party of the first part, of, in and to all that certain lot, piece or parcel of land situate, lying and being, and bounded and described as extending from beginning to the point of beginning.

Hence, that of which the abutting owner is, in the first place, declared to be destitute is not only *evidence*, but *interest* as owner, and that, whether in (1) the bed, or (2) even the soil, of the street. It detracts from the utility of this primary specification of destitution, that it was implied in the condition that the “land,” which the abutting owner has, is bounded on the side of the street.

The abutting owner has *not*, in the second place, any “interests or private rights in the street” (except, etc.). Inasmuch as an *estate* is an *interest*, as well as a *right*, it would appear that there is a defect, in logical division, in making this generic negation here; for that is to do completely what has already been done in part. Therefore, it be-

<sup>1</sup> Blacks. Comm., Book 2, ch. 7; *ad init.*

comes necessary to supply the adjective "other," as qualifying the subject-matter of this secondary specification of destitution. Besides lacking *title* and *estate*, then, the abutting owner, of this judgment, has no *other* (1) interests or (2) private rights in the street (except, etc.). The maxim, *expressio unius, exclusio alterius*, indicates the permissibility of inferring, from this negation, that the lack does not extend to *public* "rights," although the alternative word, standing unqualified, is broad enough to include both public and private "interests." But the irrelevancy of *public* "interests" of an abutting owner, to the pending controversy, suggests the theory of an inadvertence in stipulating for the privacy of "rights," exclusively; while the tenuity of the distinction between *rights* and *interests*, in the context, compels the conclusion, even at a sacrifice of consistency, that, in employing both those substantives, there was an indulgence in the rhetorical embellishment of iteration.

A qualification of the second specification of the abutting owner's lack is contained in the clause, "except such" (interests and private rights in the street) "as are incident to *lots so situated*." The meaning of the last three words appears to be "lots bounded on the side of the street," *i. e.*, whose area includes no part of the street. Whatever interests and private rights are "incident" to *all* such lots—these, and these only, the abutting owner, of this judgment, is to be understood to have. One having a lot bounded on the side of a



street, and to which certain rights in the street are appurtenant, by reason of a special feature in his title, is manifestly excluded; wherefore, Story and Lahr were *not* "abutting owners," in the sense in which the term will be used in this judgment.

It is not asserted that any interests or private rights in the street *are* incident to (all) lots bounded on the side of a street; the reader is merely notified that, *if* any interests or private rights, in the street, are so incident, the abutting owner, of this judgment, has them.

The foregoing analysis of the language of the second sentence leaves a vagueness in the concept of the "abutting owner," of this judgment, which raises an inquiry whether that, which has been assumed to be a definition, in fact possesses such a character. It is clear that a *definition* of "abutting owner," which excludes two classes of owners whose lots *visibly front on a street*, namely, where the lot legally includes a portion of the area of the street, and where easements in the street, appurtenant to the lot, are enjoyed by reason of a special feature in the title, can possess only an ephemeral utility. And reflection generates a conviction that the language describing the abutting owner, of this judgment, is a mere specification of the *plight of the plaintiff*, as the owner of a lot lying wholly without the lines of the street, and destitute of any rights in the street, *specially conveyed*.

The first place where the term, abutting owner, is used, in this judgment, is the close of the fourth

sentence of the Opinion; which, after a substitution of the announced equivalent, will read as follows:

"In addition to the finding that the plaintiff's lot does not extend beyond the line of the street, it should be noted that there is no finding that the plaintiff or any one of his predecessors ever had any title to, or estate in, the land whereon this street is maintained, or any interest in the street except that of a person having land bounded on the side of a public street and having no title or estate in its bed or soil, and no interests or private rights in the street except such as are incident to lots so situated! "

It is proposed to consider, in the next place, the "principal questions involved in this appeal" :

"(1) Has the plaintiff, by his ownership of a lot abutting on Pearl street, private rights or rights of property therein?

"(2) Have the defendants taken or materially impaired those rights, if any the plaintiff has, within the meaning of the Constitution? "

This does not mean that the two questions stated were formally submitted to the court in the argument of counsel; the declaration is a part of the judicial decision, and is equivalent to an assertion that the fate of the appeal may properly be made to depend on the answers which ought to be given to these questions.

In the statement of the former of the two questions, recurs the favorite mode of alternative enunciation, which has already been the occasion of

doubt and study. The inquiry suggested is—whether the plaintiff has “private rights *or* rights of property,” in Pearl street. If the particle “or” here introduces a true alternative, it is proposed to start upon an investigation quite irrelevant to the pending controversy; for the discovery of “rights” of the plaintiff, in Pearl street, however “private,” if not (rights of) “property,” would not suffice to bring his case within the eminent domain clause of the Constitution; which protects “property” only. If, on the other hand, there is no intention to indicate a distinction between “private rights” and “rights of property,” in the street, the subordination of the indispensable quality of perspicuity to wealth of diction cannot but make the judicious grieve. The words “by his ownership of a lot abutting on Pearl street” might refer to the plaintiff’s ownership of *his particular lot*, on Pearl street; or the meaning might be “by the bare fact of ownership of *a lot*,” as a generic concept, “abutting on *a street*.” That the latter is to be deemed the signification, may be gathered from other parts of the Opinion; for example, the forty-first sentence, where it is alleged, as “being established, that *an* abutting owner has property rights in *the streets*.” The words “within the meaning of the Constitution,” which occur in the statement of the next question, are conspicuous by their absence here, although quite essential; for the word “property,” as AUSTIN explains in his 47th lecture, is a multivocal term, being used in no less than eight different significations, and

it would be of no avail to have "property" in Pearl street, unless it were such as is referred to in the Constitution. Perhaps the suitability of omitting to allude to the Constitution, in the statement of this "question," was suggested by the fact that the eminent domain clause of that instrument speaks, with precision and distinctness, of "private *property*" only, and makes no mention of private "*rights*, or *rights of*" any other kind.

The statement of the latter of the two "principal questions" is marked by the recurrence of alternation, in the phrase "taken or materially impaired." An *immaterial* impairment would be disposed of pursuant to the maxim, "*de minimis non curat lex*"; so that the word "materially" may be considered immaterial. Now, if the design was to assert or imply that *impairment* is necessarily a *taking*, the redundancy is a cause of obscurity; and, secondly, the doctrine of such identity would *annihilate* the Radcliff-Bellinger principle—"the right of the legislature, for public reasons, to interfere with private property, to the *injury* of the owner, without making compensation,"<sup>1</sup> by destroying its *raison d'être*. If, on the other hand, an essential distinction between the participles, be conceded, then, by the intimation that an action would lie for an impairment, the same "principle well settled" is repealed; and, by the allusion to the Constitution, that instrument is incidentally amended by the addition of a feature which seventeen States of the Union have con-

<sup>1</sup> 103 N. Y. 19.

sidered could be introduced only by a vote of the people. For it is noteworthy that each of the States, Alabama, Arkansas, California, Colorado, Georgia, Illinois, Mississippi, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, South Dakota, Texas, Washington, West Virginia and Wyoming, has inserted in the eminent domain clause of its Constitution, in lieu of the word "taken," which occurs alone in the Constitution of New York, one of the expressions: "taken or damaged," "taken, appropriated or damaged," "taken, damaged or destroyed," "taken, injured or destroyed."

There is a disposition to dismiss further speculation as to the tenor of the judicial implication in this latest couplet, on reading, in the forty-third sentence of the Opinion, where there seems to be a summing up of the results of the argument, that "by the construction and operation of an elevated road in the street in front of an owner's premises, his rights are *taken* for public use, within the meaning of the Constitution" ; which might be supposed to imply that an *impairment* is ultimately ignored, and the controversy to be decided explicitly and exclusively on the basis of a *taking*. But doubt resumes its sway, when, a few sentences later, it is announced in terms, as "the conclusion" of the whole matter, that the erection and operation of the road in Pearl street "was a material *impairment* of the plaintiff's right of property" ; the Constitution being, in deference to the context, flung to the breeze.

An *impairment* of "rights" is a familiar legal conception; but it is as difficult to attain a coherent notion of the process of *taking* the "rights" of another, as it is to discover any allusion to "rights" in the clause of the Constitution, referred to in this "question," and which provides: "nor shall private *property* be *taken* for public use without just compensation."

The adverbial clause, "within the meaning of the Constitution," which concludes the statement of this "question," is *requisite* as a qualification of the verb "taken"; but the manner, in which the words, "if any the plaintiff has," have been thrown into juxtaposition to that clause, raises a doubt whether the latter was not intended to stand in relation with the verb "has."

The foregoing attempt to apprehend the exact import of the "questions," impliedly asserted to be decisive of the issues, results in a failure to discover, in their enunciation, those qualities of precision and order which it was hoped, at first glance, would be a characteristic. Hence the necessity, which has been experienced, of searching, among unarticulated propositions, in order to gather hints as to the real tenor of the coming argument.

In this manner it is possible to determine that the theorem which it is proposed, *in the first place*, to demonstrate is one which may be embodied in the three words:

*propinquitas facit proprietatem;*

—proximity of a lot, to a street, carries with it property in the street, belonging to the owner of the lot. That such is the proposal, is an authorized inference from the sixth sentence of the Opinion, where it is observed that, “if the plaintiff, *by virtue of being an abutting owner*, has not sufficient private rights or interests in this street to have enabled him to have maintained an action . . . then he is without remedy in this case”; taken in connection with the forty-first sentence, where we are informed, that the Opinion has “*established that an abutting owner has property rights in the streets.*”

The formal demonstration of theorem No. 1 is preceded by several introductory remarks:

The plaintiff's appeal, to the General Term, from the judgment dismissing the complaint, was taken solely on exceptions filed after the trial, the appeal-book containing none of the evidence; and the defendants' appeal came before the Second Division in the same plight. Under these circumstances, the rule necessarily obtained, that “the findings” (of fact) “of the trial court must be accepted as true.” It is so remarked in the third sentence of the Opinion, and immediately added:

“*In addition to the finding that the plaintiff's lot does not extend beyond the line of the street, it should be noted that there is no finding that the plaintiff or any one of his predecessors ever had any title to, or estate in the land whereon this*

street is maintained, or any interest in the street except that of an abutting owner."

The main proposition, in this sentence, is—that an obligation (to note, etc.) is added to a finding of fact. Waiving the preliminary difficulty of comprehending such a conjunctive process, the inquiry next presents itself—*why* "it should be noted" that there is "no finding," to the effect mentioned, or to any other effect? Is it because it is necessary or permissible to infer the non-existence of all facts not found? The validity of such a sweeping inference may be said to be at least doubtful; as is the utility of noting *the absence* of any finding, for any purpose. But, it is not a *pure* absence of a finding which, it is declared, "should be noted"; the obligation is—to note that there is no finding that the plaintiff, etc., ever had any title, etc., "or any interest in the street *except that of an abutting owner.*" What can this imply, if not that there *was* a finding that plaintiff had the interest of an abutting owner in the street? In truth, however, there was no such finding; and there could not have been, because the "abutting owner" is a creation of the Opinion, or, if it be conceded that the "abutting owner," of this judgment, is really "the plaintiff," then that, which we are notified to note, is—the absence of any finding that the plaintiff had any interest in the street, except the interest of the plaintiff.

The following hypothesis is submitted, with deference, as an explanation of the existence of this sentence of the Opinion: therein, the reader is



cautioned that the "interest in the street," which he is about to discover, is the creature of *mere proximity*; and reminded that this must be so because the discovery must be made on the basis of the facts found below,—where there was no finding that the plaintiff had any title, etc., "or any interest in the street." On reaching this point, a fear may have arisen lest such a desert of findings should preclude a discovery of "any interest in the street," in the abutting owner, *of this judgment* (the plaintiff); so, the exception was tacked to the sentence as primarily composed, to save all questions, except as to the meaning.

The next is the fifth sentence of the Opinion. Many of the profession had awaited the ultimate decision of the Abendroth case, with profound expectation of a display of historical erudition, in the court of last resort, analogous to that illustrated by the brilliant Opinion, on the subject of intoxicants, of Chancellor WALWORTH, in *Nevin v. Ladue*,<sup>1</sup> which should, at length, settle the long-vexed question of the quondam title, to the island of the Manhatoes, of the government which reigned over the ancestors of Diedrick Knickerbocker; but the pre-determination to cause the case to turn on the legal doctrine, of the creative power of juxtaposition, without any discrimination on account of time, title or "previous condition of servitude," made it as irrelevant to inquire whether Queen street was laid out under the auspices of their High Mightinesses, the Lords States-General

<sup>1</sup> 3 Denio, 450.

of the United Netherlands, as to penetrate into a more distant antiquity for the purpose of ascertaining whether the street was not originally a moose-trail or a beaver-slide. Dismissing, therefore, the Dutch ground-briefs with a brief pang, we gird our garments for a pilgrimage among the precedents to be invoked in support of the theorem.

A quotation has already been made from the sixth sentence of the Opinion, according to which—"If the plaintiff, by virtue of being an abutting owner, has not sufficient private rights or interests in this street to have enabled him to have maintained an action for the injuries found to have been inflicted, or for similar injuries inflicted without legislative authority, then he is without remedy in this case." This statement presents a number of points of interest, which may be successively noticed. "Property" has sunk out of sight,—leaving "private rights or interests" to enjoy exclusive conspicuity, and to furnish an artistic contrast to the "interests or private rights" of a previous sentence. As to the substantial purpose of the statement, a grave doubt may be entertained. It was well observed, in the preceding sentence, that it was unnecessary to consider the "much-debated" Dutch question, because the "abutting owner," of this judgment (the plaintiff), was to succeed on the single ground of proximity to a street. But it is manifest that, if an examination of the precedents had shown that plaintiff could not succeed by standing exclusively on his *rights of proximity*, there would have re-

*maintained a question* whether he had not a good case, based on the history of Pearl street, and of his chain of title, as found. A negation of this would imply error in the preceding sentence of the Opinion, in stating that the *necessity* of considering the Dutch question was *obviated* by the view taken of the rights of abutting owners; for the question would not be in the case at all, and it would not be *proper* to consider it. Therefore, treating the sentence as an assertion that the action must either be maintained on *rights of proximity*, or fail, it stands as an *ipse dixit*; while, if there was no intention to announce a deduction, the remark is *obiter*, since the plaintiff's actual triumph on the basis of *rights of proximity*, merely, made it irrelevant to proclaim what would have been the result, if that characteristic had not proved equal to the emergency. We linger a moment longer, over this sentence, in an attempt to apprehend the significance of its second group of alternatives—injuries inflicted with “or” without legislative authority. Although the plaintiff's action was *for an injunction*, there is a high degree of probability that “an action *for the injuries* found to have been inflicted” refers to the plaintiff's action. Assuming this to be so, and reading the sentence without the clause referring to “similar injuries,” etc., it becomes an assertion that, if the plaintiff cannot succeed in this action, by virtue of his *rights of proximity*, merely, he must fail. This implies that, if he can succeed in this action, by virtue of *such rights*, he will succeed. Next, reading the sen-

tence with exclusive reference to the "similar injuries," etc., it becomes an assertion that, if the plaintiff could not, by virtue of his *rights of proximity*, merely, maintain an action different from the one brought, he must fail in the one which he has brought,—an obscure proposition, but not more remarkable than the one which it implies, viz.: that, if the plaintiff could, by virtue of his *rights of proximity* merely, succeed in an action where the element of legislative authority was absent, he can succeed in this action, where the defendants have such authority.

The actual citation of seven authorities—six from the courts of New York, and one from Massachusetts—is prefaced by the notification that "In the cases about to be referred to the plaintiffs were not all abutting owners, but none of them owned the part of the street whereon the obstruction or encroachment was placed which was the cause of the injury complained of." The intimation here of a legal distinction, between an "obstruction" and an "encroachment," is less pointed than that occurring in the citation of the case of *Crooke v. Anderson*, in a subsequent sentence of the Opinion, and is, therefore, merely noted in passing. Those of the seven cases "about to be referred to" wherein the plaintiffs were *not* abutting owners, might seem at first blush to be irrelevant, since *Abendroth* was an abutting owner; *unless*, perhaps, we are to be treated to an argument *a fortiori*, and the seven cases are to demonstrate that everybody has "*private rights or inter-*

*ests*" in every street—"a startling proposition," and one which, if not "well calculated to fill the owners of such *property* with alarm,"<sup>1</sup> would fill every one else with amazement. But an examination of the seven cases shows that though, in every instance, the plaintiff owned a lot which fronted *on the street* "whereon the obstruction or encroachment was placed," in most of them the plaintiff did not own the bed of the street *at the place* obstructed or encroached upon, so that the apparent purpose of the sentence is to apprise the reader, in advance, that the cases will not prove to be irrelevant by reason of a possibility of tracing the sustention of the action to the circumstance that the defendant was a trespasser on plaintiff's land.

It may be permitted to premise, to our study of those authorities, that the theorem, which is to be demonstrated—the creation of property, in a street, by proximity thereto—will not be sustained by any array, though never so multitudinous, of cases where a private recovery has been allowed, for special damage suffered by a plaintiff, by reason of the maintenance of a public nuisance, whether such nuisance was maintained in the highway or elsewhere; it being clear, that such a recovery does not *imply* any ownership, in the plaintiff, of "property" in the *locus* of the nuisance.

1.—The first of the seven cases is *Corning v. Lowerre*.<sup>2</sup> It is said, of this case: "the owner of a lot on Vestry street was held entitled to main-

<sup>1</sup> 90 N. Y. 177.

<sup>2</sup> 6 Johns. Ch. 439.

tain an action to restrain the defendant from obstructing the street." The entire original report of this case is the following:

"Bill for an injunction to restrain the defendant from obstructing Vestry street, in the city of New York, and averring that he was building a house upon the street, to the great injury of the plaintiffs, as *owners of lots* on and *adjoining* that street, and that Vestry street has been laid out, regulated and paved for about twenty years.

"The Chancellor distinguished this case from that of the Attorney General *v.* The Utica Insurance Company,<sup>1</sup> inasmuch as here was a *special grievance* to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only *a common or public nuisance*, but worked *a special injury* to the plaintiffs. Injunction granted."

The Opinion merely alludes to the decision as supporting a doctrine so general that it *might* have some pertinency to the "abutting owner," of this judgment, and then drops it without special comment. But in the Opinion in 90 N. Y.,<sup>2</sup> where the decision is referred to, it is said that "KENT, Chancellor, restrained the defendant by injunction from obstructing Vesey" (Vestry) "street, in New York city, by building a house thereon, *holding that it was not only a public nuisance, but a special grievance to the plaintiffs*, affecting the enjoyment of their property, and the value of it, *and working a special injury to them*" ;—all which bore a rela-

<sup>1</sup> 2 Johns. Ch. 371.

<sup>2</sup> On p. 154.

tion to the covenant, running with the land, whereby Story's *property in Front street* was held to have been created, that might have been invisible to some.

2.—The second of the seven cases is *Van Brunt v. Ahearn*,<sup>1</sup> It is said, of this case: "the parties owned lots on Catherine street, Brooklyn. The defendant obstructed the street at a point some distance from the plaintiff's lot, causing him *special damages*, and it was held that the plaintiff had *such a private right*, the right of free ingress and egress, that he could maintain an action to recover his damages and restrain the continuance of the obstruction." It is perplexing to read,<sup>2</sup> that this was an appeal from an order *overruling a demurrer* to the complaint, on the ground, among others, that the complaint did not *state facts* sufficient to constitute a cause of action,—and that the General Term's holding was as follows:

"The complaint *does state* facts sufficient to constitute a cause of action. It *alleges* that the plaintiff is the owner of land fronting on Catherine street, and that his only public entrance to the said land and his only mode of access was through that street; *that he has a private right of way as an easement* over the said street to his lands, AND ALSO that it is a public highway, and that the defendants have fenced up the street and continued the obstructions so that the plaintiff cannot reach his land through the same. *If* the plaintiff has a right of way over the street, then, although

<sup>1</sup> 13 Hun, 388.

<sup>2</sup> *Id.* 388, 389.

the obstructions are not a public nuisance, yet the plaintiff has the right to have it abated and to invoke the aid of the court to cause its removal.<sup>1</sup>

*If the street is a public highway, then the obstacles are a public nuisance, and the plaintiff may maintain this action for its abatement, having alleged special damages peculiar to himself.*"<sup>2</sup> That is, the court *held*, in substance, that *if plaintiff had an easement* in the street, he could maintain an action to restrain the taking thereof by the defendant, who was *alleged* to "have wrongfully dug up this street and erected upon it a building, and placed across it a fence, so as to prevent all passing over it by the plaintiff, and that damage has resulted to the plaintiff by these wrongful acts."

3.—The third of the seven cases is *Crooke v. Anderson*.<sup>3</sup> It is said, of this case: "the parties owned lots on Washington avenue in the City of Brooklyn, and the defendant encroached (not obstructed) on that part of the street which was in front of his lot, so that the street was less convenient for the plaintiff's use in going to and from his lot, thus specially damaging the plaintiff; and it was held that he could maintain an action to *abate* the encroachment." It was also *held* that the encroachment wherewith the defendant encroached, not obstructed, on the street was a *public nuisance*. Says BARNARD, P. J.,<sup>4</sup> after mentioning that each party was an owner of land on the avenue: "The

<sup>1</sup> 3 Hill, 604.

<sup>2</sup> 7 Hun, 7; 55 Barb. 404.

<sup>3</sup> 23 Hun, 266.

<sup>4</sup> *Id.* 268.



defendant has carried his fence into Washington avenue, and his stoop, so that it leaves but eight feet for public travel instead of nineteen feet, as it is laid out to have. . . . The access of plaintiff's property is thus peculiarly affected by this *obstruction*. The law is so well settled, that it needs no authority to be cited, that any person who is *peculiarly injured by a public nuisance* may have his remedy in equity to *abate the nuisance*. The extent of this peculiar injury is not of the slightest consequence so far as the right of action is concerned. I think a fence, which compels the plaintiff to go around it in order to go to and from his premises situated 106 feet from it, sufficient to give the right of action." The reporter says: "The action was brought to *abate an alleged nuisance*." The emphatic manner in which the Opinion, in alluding to this case, stipulates for an "encroachment" and repudiates an "obstruction," might seem to indicate that more comfort could be derived by the "abutting owner," of this judgment, from a condemnation of the former than of the latter kind of purpresture. But BARNARD, P. J., *held* that there was an "obstruction."

4.—The fourth of the seven cases is *Fanning v. Osborne & Co.*<sup>1</sup> It is said of this case: "Affi'd, 102 N. Y. 441. The plaintiff was an abutting owner on Garden street, in the City of Auburn, and the defendant, *without legislative authority*, maintained a railroad track in the street, over which cars were drawn by the power of steam.

<sup>1</sup> 34 Hun, 121.

It was held that the plaintiff (he showing that he had sustained special damages) had a sufficient private right *in the street* to maintain an action to restrain the operation of the railroad." Turning to 34 Hun, it is found that plaintiff's original grantor, owning land including plaintiff's lot and the land afterwards known as Garden street, conveyed the lot by a description which stated that it abutted on the street. The General Term held that the grantee "*thereby became entitled, as a purchaser, to have the space of ground covered by the street left open forever as a street,*" and "to the right of using the way for every purpose that may be usual and reasonable for the accommodation of the granted premises" ; that the construction, maintenance and uses of a steam railroad in the street in the manner and for the purpose specified in the findings were *destructive of the use of the street as such*; and that, the plaintiff's property rights, so far as interfered with, not having been compensated for, the plaintiff was entitled to an injunction and damages, notwithstanding that the defendants were acting with the consent of the street railroad company, and under the sanction of its charter. This decision involved the proposition that plaintiff's easement in the street was created by the implication in a deed. The Court of Appeals <sup>1</sup> did not, however, affirm this position, but affirmed the judgment against the corporate defendant on the ground that it was maintaining a *public nuisance*, which caused special injury to

<sup>1</sup> 102 N. Y. 441.

plaintiff; and expressly refused to decide whether, in view of the deed mentioned, "the construction and operation of a street railroad in the street would be a taking of the plaintiff's property, for which, under the Constitution, he would be entitled to compensation." <sup>1</sup> "The construction and maintenance," says ANDREWS, J., "of a street railway, by any individual, or association of individuals *without legislative authority*, would constitute a public nuisance, and subject the persons maintaining it, not only to indictment, but also to a private action in favor of *any person sustaining special injury*." The judge remarks, indeed: "It is proved by the evidence, and it is found by the trial judge that the use of the railroad through Garden street has greatly obstructed the street, and rendered it unsafe for teams and vehicles of the plaintiff and others using the same, *and has impaired and injured plaintiff's right and interest in and to the street*, and greatly injured his business and depreciated the value of his property." But it is clear, from the tenor of the Opinion, that it was not meant, by this allusion to the findings below, to decide that plaintiff had property *in the street*; for the judge immediately adds: "The facts found show a *special injury* sustained by the plaintiff from the operation of the railroad, which justifies the interference of equity, *unless* it is made to appear that *the defendant corporation has a legal right* to maintain a railroad on Garden street for its private convenience." That is, proof of the

<sup>1</sup> Page 446.

existence of legislative authority would have defeated the action. *But legislative authority could not sanction* the taking of private property without compensation.

5.—The fifth of the seven cases is cited, with the remark that “the same doctrine was held in *Hussner v. Brooklyn City R. R.*”<sup>1</sup> A proper inference from the context is that “the same doctrine” means the doctrine of the *Fanning* case, *supra*; but, as different doctrines were held in that case, below and in the Court of Appeals, neither of which, by the way, contained any comfort for the “abutting owner,” of this judgment, the meaning is uncertain.

The *Hussner* and *Abendroth* cases were identical, in that the plaintiff, in each, had no standing except on his juxtapository rights, if any. In not placing much reliance on this assertion, in support of which the *Story* and *Lahr* cases are cited, the Opinion follows its maker, who immediately proceeded to decide the case on an entirely distinct point, viz.: that the use of steam as a motive power on Third avenue, *north of Twenty-fourth street*, opposite to plaintiff's lot, *being unauthorized by statute*, “so far as it, and the manner in which it was used there in the operation of the cars, had the effect to molest the *occupants* in the use and enjoyment of the premises, as indicated by the evidence on the part of the plaintiffs, was in the nature of a nuisance.”<sup>2</sup>

6.—The sixth of the seven cases is *Callanan v.*

<sup>1</sup> 114 N. Y. 433.

<sup>2</sup> *Id.* 437.

Gilman.<sup>1</sup> It is said, of this case: "two abutting owners on Vesey street, in the City of New York, were engaged in business in adjoining stores. It was held that the plaintiff could by action restrain the defendant from improperly obstructing the sidewalk by using a temporary bridge, or plank-way by which goods were taken from and into the store, and thus causing a special injury or damage to the plaintiff." The citation discloses one of the plainest cases of a public nuisance, causing special damage to plaintiff, to be met in the reports. In his opinion, Earl, J., uses the word "nuisance" ten times, and such expressions as these: "The defendant was, therefore, guilty of a public nuisance" ; <sup>2</sup> "it is the undoubted law that the plaintiffs could not maintain this action without alleging and proving that they sustained special damage from the nuisance, different from that sustained by the general public; in other words, that the damage they sustained was not common to all the public living or doing business in Vesey street and having occasion to use the same" ; <sup>3</sup> "the facts proved and found show special damage from the nuisance to the plaintiffs. There was some proof that some custom was turned from the plaintiff's store on account of the obstruction, and that pedestrians were turned to the north side of the street before reaching the plaintiffs' store. That the plaintiffs suffered some special damage not common to persons merely using the street

<sup>1</sup> 107 N. Y. 360.

<sup>2</sup> Page 370.

<sup>3</sup> Page 369.

for passage is too obvious for reasonable dispute." <sup>1</sup>

7.—The last member of the septenate is *Stetson v. Faxon*.<sup>2</sup> The Opinion, in describing the *holding* in this case, says: "In an action *to recover damages* it was held that, *the old street not having been legally discontinued*, the defendant was liable." In delivering the Opinion of the Massachusetts Court, PUTNAM, J., says: "We are all satisfied that the case comes *to the single point*, whether or not the plaintiff can maintain this action for special damages sustained by the *public nuisance* upon a highway. In other words, whether the evidence produced is sufficient to prove that the plaintiff has received particular damage from this *nuisance*, which was not common to all the people." <sup>3</sup> The facts were, that, a highway in a city having been duly established, the city afterwards sold the land constituting the highway to defendant, who erected a house thereon; there being no evidence that the highway had been legally discontinued. Plaintiff proved that, "by means of the obstructions made by the defendant upon the highway," his warehouses, abutting thereon, had been greatly obscured and injured, and access thereto prevented from and along the part of the highway so obstructed, etc.<sup>4</sup> These were *held* to be "sufficient special injuries, peculiar to the plaintiff and not common to all the citizens," to sustain an action on the case.<sup>5</sup>

<sup>1</sup> Page 371.

<sup>2</sup> 19 Pick. 147.

<sup>3</sup> Page 154.

<sup>4</sup> Page 161.

<sup>5</sup> Pages 161, 162.

At this point it may be permitted to garner the fruitage, now discernible, of the toil in the American field, in the following logical sheaf:

A public nuisance, causing special private damage, gives a private cause of action (cases 1, 3, 4, 5, 6, 7); an allegation, in a complaint, that a private easement has been taken, states a cause of action (case 2); therefore, juxtaposition creates private property in a public street.

"The principle running through these cases," it is said, "has been maintained in England for at least two hundred years (*Maynell v. Saltmarsh*, 1 Keb. 847; *Fritz v. Hobson*, 14 Ch. Div. 542)."

Here is the former of the reports <sup>1</sup> in full:

"In action upon the case *vi & armis* for erecting posts in the highway of North Killington, which leads to Fothornton street (*per quod*, the plaintiff having close in another vill, Bowland in Thrisk, and used that thence *maxima propinque via* to be over the said highway) which so stopt the way that his corn in his close was corrupted and spoiled: After judgment in C. B., Stroud assigned for error, that this action lieth not, especially *vi & armis*, it being reasonably to be intended there was other ways. Jones agreed that if I have ten private ways, the stopping any is sufficient, with sufficient damages; but this being a *nuisance* in the highway, there ought to be an *indictment*. *Hyde and Windham*. Being after verdict, the Court will not intend any other way; also this is a *sufficient special damage*, and not like *Williams' case*. Also by

<sup>1</sup> 1 Keb.

*Windham* in the West Country, in action upon the case for digging a pit in the highway, *per quod* J. S., for whose life the plaintiff had lease, fell therein and was drowned, it was doubtful if this action lay; but doubtless ours is a *more immediate damage*. 2. There was a default at *Nisi prius*, and thereon a *Tales* was awarded in C. B., which is the usual course on *remanent* of juror, or when any are withdrawn. Judgment affirmed."

We have thus drawn this report out of the fog of the seventeenth century, in order that, if the *Abendroth* case really was decided at the Hilary term of the K. B., in 17 Car. II, B. R., everybody should know it. But it appears that the principle inculcated is the familiar one—that indictment is not always an exclusive remedy in case of a public nuisance. It is said, in 19 Pick. 159, of the *same* principle: "The rule of law, which is applicable to the case at bar, has been in full force for many centuries."

The modern English case cited, *Fritz v. Hobson*,<sup>1</sup> was, in the words of the report, an action "brought to restrain an alleged nuisance committed by the defendant, and for damages."<sup>2</sup> Plaintiff was a dealer in old china and other curiosities, having a house situated on the north side of, and bounded on its south side by a narrow passage, on which a window and two doors of plaintiff's house opened. Defendant was a builder, who had *unreasonably blocked up* this passage by building operations connected with the erection of

<sup>1</sup> *Supra* (1879).

<sup>2</sup> L. R., 14 Ch. Div. 543.



a structure on premises in the vicinity. No cart or wagon could approach close to the premises, the "passage" being only a footway. This passage "was for a long period of time practically devoted to the defendant's building operations."<sup>1</sup> Plaintiff proved that he had "*sustained considerable loss in his business as a dealer in old curiosities, in consequence of the defendant's operations.*"<sup>2</sup> FRY, J., says:<sup>3</sup> "The plaintiff puts his case in two ways. He says, first, the defendant has created a public nuisance, which has resulted in special or peculiar damages to me in consequence of the place where I reside, and the place where the nuisance had been committed being so near to each other; and, secondly, I have a *private right of entrance from the highway to my dwelling house, and that private right the defendant has interfered with.*" The Judge then discusses the question whether the defendant's use of the passage had been unreasonable, and *holds* that it had. "For exactly how many days it was *unsafe to cross that passage* I do not know, but certainly for months those operations went on, and it appears to me that they went on in such a manner as to render it exceedingly difficult, if not impossible, for persons coming up from Fleet street on the eastern side of Fetter lane, to obtain access to the plaintiff's premises, and the natural effect would be to drive away persons who might have become customers of the plaintiff, and to render the ac-

<sup>1</sup> *Id.* 553.<sup>2</sup> Page 551.<sup>3</sup> *Ibid.*

cess to his house so difficult that most persons would abandon passing along that side of the road." <sup>1</sup>

. . . "Then arises the question, does this state of circumstances give rise to *any legal right* in the plaintiff? " <sup>2</sup> The judge then quotes the following language of Lord HATHERLY, in *Att'y Gen'l v. Conservators of the Thames*:<sup>3</sup> "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river. The existence of such a private right of access was recognized in *Rose v. Groves*.<sup>4</sup> As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but on the principle that a private right of the plaintiff had been interfered with. Independently of the authorities, it appears to me quite clear that the *right of a man to step from his own land on to a highway* is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road, and though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character

<sup>1</sup> Page 553.

<sup>2</sup> *Ibid.*

<sup>3</sup> 1 H. & M. 1.

<sup>4</sup> 5 Man. & G., 613.

of the right.”<sup>1</sup> The judge then says: “Applying that principle to the present case, it appears to me on the evidence that the access to the plaintiff’s door in the passage was interfered with by the acts of the defendant, which I hold to have been unreasonable, and therefore wrongful, and, that being so, the cases to which I have referred are authorities for the plaintiff, and show that he is entitled to recover the amount of loss which he has suffered in the business which he carries on upon his property. But I will consider the case further on the ground of the private injury resulting from the public nuisance.”<sup>2</sup> The judge then holds that the plaintiff has shown the three things necessary to enable him to recover in case of a public nuisance, viz.: (1) a particular injury to himself, beyond that which is suffered by the rest of the public; (2) that the injury is direct and not a mere consequential injury; and (3) that the injury is of a substantial character, and not fleeting or evanescent. The judge thereupon declared the plaintiff “entitled to judgment for damages to the extent of £60.”<sup>3</sup>

It is to be admitted that there is, in the language of Lord HATHERLY, an intimation of the existence, in the English law, of a private “right of the owner of a roadside property to have access thereto,”—“right of a man to step from his own land on to a highway,”—an unreasonable interference with which may justify a judgment for damages, recov-

<sup>1</sup> Page 554.

<sup>2</sup> *Ibid.*

<sup>3</sup> Page 556.

erable in an action wherein a *public nuisance* is not alleged.

But, in estimating the weight and relevancy of this intimation (and of the former of the two grounds upon which it was accordingly suggested that Fritz could recover), in respect of the pending investigation, it is to be observed:—

that the English private right, asserted, is one of access only, and that the acts complained of by Abendroth did not, “as found by the Court, impair in any substantial degree the accessibility of the plaintiff’s premises” ;<sup>1</sup>

that two grounds for a recovery were stated, in *Fritz v. Hobson*, one being special damage suffered from a public nuisance, and it is difficult to say which was *obiter*;

that there is nothing in the Opinion in that case, locating any private *right* of the plaintiff *in the street*—such location being a *sine qua non* in the pending demonstration;

that, if such right were fixed *in the street*, it would be impossible to identify it with the “private property” protected by the American Constitutions;

that Fritz’s recovery,—“the amount of loss which he has suffered in the business which he carries on upon his property,”<sup>2</sup> could not have been had against an elevated railroad company in New York,<sup>3</sup> or even against *a railroad* company in England,<sup>4</sup> such damages being held to be too

<sup>1</sup> 122 N. Y. 14.

<sup>2</sup> L. R., 14 Ch. Div. 554.

<sup>3</sup> *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Super. 311.

<sup>4</sup> *Ricket v. Directors of Met. R. Co.*, L. R., 2 H. L. App. Cas. 175.

remote to be deemed to flow from an injury to real *property*; and

that Hobson's tort was an unreasonable act, committed without pretense of a public use, or of legislative authority.

These peculiar characteristics of the latter of the two English precedents, cause it, when confronted with the doctrine awaiting demonstration—the genesis of property by proximity—to evanesce.

It is next remarked, that “the *same rule* has been held applicable to country highways (*Pierce v. Dart*, 7 Cow. 609; *Hood v. Smith*, 5 N. Y. W. Dig. 117), and has received the sanction of the courts of most of the States of the Union (Ang. High., § 285).” But an examination of the citations shows that we are still in the region of a *public nuisance*. The case of *Pierce v. Dart* (*supra*) was an “action for a *nuisance*, in building a fence across a public highway, near the residence of the plaintiff, in consequence of which he complained that he had received special damage.”<sup>1</sup> The point of the case was, that proof of *trifling* “special damage” was sufficient, viz.: plaintiff’s “delay and labor in abating the nuisance, so that he might proceed on the road.” The report of *Hood v. Smith* (*supra*), is well-nigh unintelligible; but it can be gathered that plaintiff owned land bounded in front by a highway, which was the only means whereby his land could be reached. An action by him against defendants, to recover damages for “having fenced up” the highway,

<sup>1</sup> 7 Cow. 609.

and to restrain the continuance of the obstruction was sustained. "Ang. on High., § 285," is a division of Chapter VI of that work entitled "Nuisances and their Remedies" ; and the entire section is an elaboration of this, an early sentence: "But if any individual from a *common nuisance* suffers a more special damage than any other, in such case, and because of his special damage, he shall have his separate action on the case." The notes to the section specified contain citations from twenty-six of the forty-four States of the Union; it thus appearing to be true, as asserted, that the "rule" which renders consistent publicity in a nuisance with a private action by one specially damaged thereby, "has received the sanction of the Courts of most of the States of the Union."

The Opinion proceeds: "These cases do not rest on the fact that the wrongs happen to amount to public nuisances, for no person can maintain a private action for the recovery of damages against the creator or maintainer of a public nuisance unless it occasions him special damages by an immediate injury to his person or property or by a consequential injury to his property (*Lansing v. Smith*, 8 Cow., 146; *affi'd* 4 Wend., 10; *Wood, Nuis.*, 655)."

The foregoing is an important sentence in its bearing on the pending issue—the creative power of juxtaposition.

It will be convenient to examine the main proposition—"these cases do not rest on the fact that the wrongs happen to amount to public nuisances"

—and the remainder of the sentence, wherein is alleged the reason for such assertion, separately.

One of the eleven cases previously actually cited, *Van Brunt v. Ahearn*, did not “rest on” any fact except the character of the allegations of the complaint. Therefore, the allusion cannot be to more than the remaining ten of those cases, with *or without* those cited by Angell, in his work on *Highways*.<sup>1</sup>

The substance of the main proposition justifies an inference that the “cases,” intended, severally involved “the fact” upon which they are asserted not to have rested; which, moreover, also appears from the reason, given for the assertion, derived exclusively from an alleged theory of a private action brought in case of a public nuisance. Hence, the main proposition contains an announcement of the doctrine—that a private action for a public nuisance does not rest on the public nuisance. This doctrine, which surprises by its novelty, appears to carry with it the result, that “the fact” of the public nuisance may be disregarded in the theory of the private action. The familiar rule is recalled, “that one erecting or maintaining a common nuisance . . . is liable at the suit of *one who has sustained damage peculiar to himself*,”<sup>2</sup> or, stated negatively, “that, for a common nuisance, an action cannot be sustained, except by *a person who has suffered some special damage*”;<sup>3</sup> and, if the

<sup>1</sup> Ang. High. 285.

<sup>2</sup> Per SUTHERLAND, J., in *Lansing*

<sup>3</sup> *Francis v. Schoellkopf*, 53 N. Y. v. Smith, 8 Cow. 151.  
154.

nuisance may be disregarded, it would seem that nought is left to support the action, except *damage*. But *damnum absque injuria* may be said to be a definition of *no* cause of action.

The subordinate clause of the sentence, now under examination, asserts that "no person can maintain a private action for the recovery of damages against the creator or maintainer of a public nuisance unless it occasions him special damages by an immediate injury to his person or property, or by a consequential injury to his property." At first reading, this array of injuries, in a single cause of action, produces bewilderment.

It will not be denied that a public nuisance is an injury. This injury, by the express judicial announcement, "occasions special damages" to the plaintiff. Such concomitance of cause and effect might be supposed to be not only adequate for the theory of an action, but necessarily exclusive of any other essential constituent features. But this injury causes the damages *by* another injury—an "immediate or consequential injury." Is not here a sufficient reason for banishing the public nuisance from contemplation, viz.: to give room for operation to the otherwise supernumerary *injuria*, the "immediate or consequential injury," by which the to-be-forgotten injury, the public nuisance, occasions the special damages? Banishing the invidious accidental element of a public nuisance, we couple the "immediate or consequential injury" with the "special damages," and thus obtain a



sufficient and necessarily exclusive combination of the elements of a substantial recovery—*injuria cum damno*.

This *deus ex machina*, the “immediate or consequential injury” is a wrong, and so connotes a right; it is a private wrong (publicity has been eliminated), and so connotes a private right; a right *being* property, a private right is private property; where the wrong is, *there* will also the right be; wrong and “property” dwell together, *in the public street*. Behold—*private property of the abutting owner, in the street*, protruding from the interior of a public nuisance!

It is, however, discovered that, neither in *Lansing v. Smith*, nor in *Wood, Nuis.*, is any support for the extraordinary assertion of the condition for maintaining a private action for a public nuisance, which those authorities are cited to sustain. *Lansing v. Smith* was an action brought by the owner of a private dock on the Hudson River, the title to which emanated from the State, against commissioners, for erecting, pursuant to a statute which was attacked as unconstitutional, the Albany Basin, and certain temporary bridges, whereby access to the plaintiff's dock was impeded. The Supreme Court, on a motion to set aside a nonsuit, *held* the statute to be valid; and then proceeded to explain, at some length, that, *assuming* a want of statutory authority on the part of the defendants, and so that the basin was a public nuisance, the plaintiff could not recover, because he had not shown “special damage,” the proof being merely

"depreciation of the value of his dock." <sup>1</sup> In the Court of Errors, the judgment of the Supreme Court was affirmed, the Chancellor *holding* that the erection of the basin did not involve the taking of private property, nor the violation of any contract, and that, as to the temporary bridges, of which plaintiff also complained, the evidence failed to connect the defendants with their construction.

At the close of his Opinion, the Chancellor indulged in some *obiter* remarks on the theory of a private action for a public nuisance, saying that, if an individual "sustains no damage but *that which the law presumes* every citizen to sustain, because it is a common nuisance, no action will lie," yet "every individual *who receives actual damage* from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation." <sup>2</sup>

The chapter in Wood on Nuisances, referred to by the court contains a rambling, unedited narrative of the successive decisions, from COKE's time downwards, relating to private actions for public nuisances, which illustrates, in a remarkable manner, the intellectual difficulty of distinguishing the "special damage," prescribed as a condition of maintaining the action, from that *share* of the general damage, to the public, necessarily suffered by an individual, as one of the public, especially in a case where the individual's share is more than an *aliquot* proportion; and the language of the courts,

<sup>1</sup> 8 Cow. 168.

<sup>2</sup> 4 Wend. 25.

rendering those decisions, exhibits a lamentable inaccuracy in frequently employing the term "injury," in the sense of *loss* or *damage*—which would render meaningless the legal phrases *damnum absque injuria*, and *injuria sine damno*; but nowhere in the chapter is found the remotest hint of the theory of two *injuriæ* and one *damnum*, in a single cause of action, one of the injuries causing or occasioning the "damages" by the other.

A public nuisance, in any assumed case, is a group of visible, tangible or otherwise sensually perceptible physical phenomena, detrimentally affecting many individuals, throughout an entire neighborhood—termed *the public*, the detriment being directly traceable to such phenomena as its sole and efficient cause. Given, therefore, such a cause, in active operation, and producing its appropriate effects, what room is there for an additional cause of the same detrimental effects unless it be injected into the theory of the "private action" only for the purpose of connoting a *right* of which it may be declared destructive?

How simple and adequate, on the other hand, is that theory of a private action for a public nuisance which might, perhaps, be stated thus :

There is one *injuria*, tortious act—which, either because it infringes a definite public right, such as the right of travel, or because it afflicts an entire neighborhood or community, like the tannery in *Francis v. Schoellkopf*, the law stamps with the character of a public wrong—a public nuisance.

For sufficient reasons, the *general* rule has been established, that such an act is to be restrained, abated, punished, only by *public* process. But the public is nothing more than an aggregation of individuals; and, although it is not permitted to each individual to proceed privately, simply on the score of his ratable theoretical share of the public detriment, yet in the workings of the complicated mechanism of civilized society, it frequently must happen, and so has happened, that an individual suffers from this same act, and not any imaginative sublimation therefrom, an amount and kind of detriment which the law holds to be "special," "peculiar to himself." In such a case, the law allows the individual to proceed privately. It is not incumbent here to reconcile and bring out into the bright glow of rationality all the decisions as to the requisite qualities of this "special damage," including those which *hold* that it must be different not only in degree but also in kind from the general damage. The desired object is accomplished when it is pointed out that the "private right" existing in such a case is adequately and exhaustively explained and described as a mere *right of action*—the creature and gift of the law which says, in its arbitrary permission, that the individual *may sue* in the exceptional case. A private wrong is, indeed, present, but only in the sense that, in view of the "special damage," the law regards the public nuisance, in its aspect as the cause of such damage, as a private wrong; and there is also a private right, but it is simply a right

to maintain the action, and not an "interest or private right," *in the land* whereon the nuisance is generated, or in any other.

If the judicial argument prove anything, it proves too much, for, depending exclusively upon an inference from the theory of a private action for a public nuisance generally, without any distinctions or exceptions, the conclusion is necessarily as broad as this premiss, and involves the credible doctrine that every landowner, by reason of his ownership, has a *property right*, not only in the land of his immediate neighbors, but in the land of others within an indefinite area, circumscribed only by limits beyond which an hypothesis of the existence of a public nuisance, specially affecting him, becomes impossible.

This *proprietyship* of every landowner in every other landowner's domain might be expected to lie dormant under ordinary circumstances, but should any landowner have the temerity to generate a public nuisance on his own premises, whereby a neighbor sustained special damage, the latter's encumbrance upon, or tenancy in common in, the land of the former would come prominently into notice as a necessary sequence of the competency of the one so damnified to maintain a private action against the wrongdoer.<sup>1</sup>

Recoiling from a conclusion which involves so startling a result, a distinction will be supposed to be taken, as follows: Where a public nuisance is generated upon land being the private property

<sup>1</sup> See *Francis v. Schoellkopf*, 53 N. Y. 152.

of the tortfeasor, the theory of a private action, maintainable by one suffering special detriment from such nuisance, is contained in the maxim "*sic utere tuo ut alienum non laedas*"; but where the public nuisance originates in a public place, and is devoid of any such element as the pursuit of a lawful private calling, or other the exercise of a private right, by the perpetrator, there is no *tuum* or *suum*, to be *used*, to the lesion of another, or otherwise. In the latter class of cases, for the reason that no other ground for the maintenance of the private action can be imagined, the assigned explanation must be adopted.

But it is impossible to rest on this conclusion; for it is repeatedly stated by Wood (on Nuisances), in the chapter cited, that a private action is maintainable against the perpetrator of a public nuisance, where the latter violates a *vested right*, without *any proof of actual damage*,—the law importing "special damage" from the violation of such right. Says Wood: "It was never intended by the Courts to hold that, where a *vested right* was injured, this was not a sufficient special damage to maintain an action against the promoter of a public offense." <sup>1</sup> Again: "all through the reports we find instances, without number, where the courts have upheld actions for injuries to *private rights*, even where no damages were proved, showing the nicest regard for individual rights, and building up a system for their protection that commands the admiration and respect of all mankind," <sup>2</sup> citing

<sup>1</sup> 2d. ed., p. 747, § 683.

<sup>2</sup> *Id.* p. 750, § 685.

numefous English cases. The same author, after quoting from the language of the Court in *Robert Mary's case*,<sup>1</sup> remarks: "Now it will be observed that the Court refers to public nuisances in the highway, and gives, as a reason why a private party shall not have his private remedy, except he be specially damaged, that such damage is, in its own nature, public and not private, but if the person injured by the nuisance in a highway, as by an obstruction by which he was only delayed in his journey, or from which he had sustained no special damage at all, except an interruption of his public right, sets up in his declaration that he or his grantors *had a private way over the highway before it became a highway*, then the person setting up this *private right* may maintain his private action for the injury to his *private right*, and that, even though he has suffered no special damage; and the distinction is that, although he has sustained no actual damage, yet he sustains an injury not common to the public, because, in addition to the right he has acquired to travel over the road as one of the public, he has also a *private right of way* that outlasts the public right, and that may be lost by laches on his part in asserting and maintaining. This was held in the case of *Allen v. Ormond*,<sup>2</sup> and is sustained by a multitude of authorities. In *Wells v. Watling*,<sup>3</sup> this idea that wherever a person has a *private right*, independent of, or in addition to, the public, that may be lost

<sup>1</sup> 9 Coke, 113.

<sup>2</sup> 2 Black, 1233.

<sup>3</sup> 8 East, 4.

by adverse user, the party whose right is injured may have his private action, even though he sustains no actual damage, is fully sustained.”<sup>1</sup>

Whence it appears that, to the general rule prescribing, as a condition precedent to maintaining a private action for a public nuisance, that the plaintiff *must show special damage*, there is a well-established exception, embracing cases where the public wrong impairs a private *vested right*, to which class rights of *property* may belong.

Now, this undeniable exception *annihilates the rule*, if the inference, of the existence of a vested right in the *locus* of the nuisance, be allowed from the mere maintainability of a private action where special damage is shown, because *every such action* then becomes one in support of a “vested right”; —wherein no damage need be shown: which contradicts the hypothesis! Since the doctrines, alike of the rule and of the exception, are unalterably established, the inference must be rejected.

The next, and twenty-fourth sentence is to the effect that “all of *these cases* were for the recovery of consequential damages to real property bounded by the side or centre of the street, or for the recovery of such damages sustained by occupants of such property, and in none of the cases were the obstructions or encroachments on *or opposite to* the property of the plaintiff.”

The substantial purpose of the sentence would seem to be, to add to the negation, contained in the immediately preceding sentence, of the inap-

<sup>1</sup> Wood, Nuis. p. 750, § 887.



plicability of those cases as precedents for the case at bar, an affirmative intimation of their relevancy and resemblance. All of the cases, it is said, were "for the recovery of *consequential damages*,"—which damages here replace the "consequential injury," a moment ago in contemplation. The implication is, that Abendroth's case was also one of consequential damage; which may be conceded, though it was not a case "for the recovery of" *damages*, but was one for the recovery of a judgment of injunction. Such of "these cases" as affected "real property bounded by the *centre* of the street," might be thought objectionable as precedents for the "abutting owner," of this judgment, whose land is "bounded on the side," were it not for the reminder that the obstructions or encroachments were not "*on* the property of the plaintiff." The same clause, in asserting that "in none of the cases, were the obstructions," etc., "*opposite* to the property of the plaintiff," hints at an *argumentum a fortiori* in favor of the "abutting owner," of this judgment, in necessarily locating the *street-property* of the owner of a lot "bounded by the side of the street," *outside of* the area included between the lateral lines of his lot, produced across the street. Owning property in the street, at a distance from his land, how much more certainly must he own property in the street "*opposite to*" the same?

The Opinion proceeds to admit that "there are important differences between the case at bar and those cited." One of the differences is stated to

consist in the fact that none of the acts which were *held* to be actionable, in the cases cited, "were done pursuant to legislative authority, while in the case at bar the acts complained of were done pursuant to such authority." The existence of this authority, in the case at bar, prevented, by a well-established rule, the acts complained of from being a public nuisance; but, it having been shown that the public nuisance may be disregarded in the theory of an action for a public nuisance, it is difficult to perceive why this difference should be deemed important. The other difference is stated to consist in the fact that the acts which were held to be actionable, in the cases cited, "wholly or partly obstructed the streets, and rendered the property of the plaintiffs less accessible," while in the case at bar the acts complained of "do not, as found by the court, impair in any substantial degree the accessibility of the plaintiff's premises." Now the elevated railroads interfere only with light, air and access, in the street, at the most,<sup>1</sup> and Abendroth's *access* was not interfered with; and the interference with *light* and *air*, in the cases cited, could not have been material, if "in none of the cases were the obstructions or encroachments *on or opposite to* the property of the plaintiff."

"But these cases," it is said, "*do establish* the principle that the owner of a lot on a public street, whether it extends across, to the centre, or only to the side of the street, has incorporeal private rights therein which are incident to his property,

<sup>1</sup> *Am. Bank Note Co. v. The N. Y. El. R. Co.*, 129 N. Y. 272.

which may be so impaired as to entitle him to damages." Manifestly, we are confronted with a condition and not a theory.

In the twenty-eighth sentence of the Opinion, the argument continues: "If this be not so," *i. e.*, if the "abutting owner," of this judgment, has not such incorporeal private rights in the public street, "it is difficult to see how he can maintain any action except such as can be maintained by a stranger for an immediate injury to person or property caused by an obstruction while lawfully travelling in the street."

It is submitted that mere difficulty of vision is not enough, and that it ought to be impossible "to see how he" (the "abutting owner," of this judgment) "can maintain any action except," etc., in order to endue the argument with the requisite force; for ANDREWS, J.,<sup>1</sup> though finding it "difficult . . . to trace its origin, or to refer it to any exact legal principle," promulgated *genesis of property by proximity* as the law in New York, declaring it to be "the prevailing doctrine of American jurisprudence," on the strength of some southern and western decisions.<sup>2</sup> Assuming, then, the meaning to be, that, unless the "abutting owner," of this judgment, has the "incorporeal private rights" specified, he *cannot* maintain "any action except such as can be maintained by a stranger, for" the cause mentioned, the inquiry arises—*what sort of action* that is, which "a

<sup>1</sup> In *Kane v. The N. Y. El. R. Co.*, 125 N. Y. 180; 1891.

<sup>2</sup> Oh., Ky., Mo., Ga., Kas., Miss., Neb., Ind.

stranger" can maintain "for an immediate injury to person or property caused by an obstruction while lawfully traveling in the street? "

"Actions by strangers" is a topic of the law, with which the reader may be excused for a lack of familiarity, the books furnishing no intimations of a discrimination against *them*, as compared with those who have relatives or friends in the city or village, wherein is the street by an obstruction whereof they are "immediately injured," in person or property, while lawfully traveling. Perhaps, the strange allusion is to a person, lawfully traveling in the street, who has not even so slender a bond of interest, connecting him with the street, as is possessed by the "abutting owner," of this judgment.

If this be so, the stranger's action is none other than *the original private action for special damage from a public nuisance*, as to which COKE lays down the doctrine, in his Institutes:<sup>1</sup> "If a man be disturbed to go over a common highway, or if a ditch be made across it so that he cannot go, yet, he shall not have an action upon his case; and this the law provided to prevent a multiplicity of suits; for if any one man might have an action, all men might have the like, *unless any man has particular damage; as if he and his horse fell into the ditch whereby he received hurt and loss, then for this special damage, which is not common to all, he shall have an action upon the case.*" This passage from COKE is quoted by WOOD, at the opening of his chapter

<sup>1</sup> Vol. 1, p. 56, note a.

on "Private actions for injuries from public nuisances," as laying down the early and rigid rule, which restricted private actions to cases of direct hurt; that author observing that the rule was afterwards relaxed so as to permit consequential, as well as direct, special damage to person or property, to be remedied by a private action.<sup>1</sup>

The implication, therefore, is that the "abutting owner," of this judgment, *can maintain an action*, in respect of an obstruction or encroachment in the street, *other than* the ordinary action for special damage from the public nuisance; and his competency to maintain *such an action* is held up as proof of his ownership of "incorporeal private rights" in the street.

At this point in the argument, a summary appeal is taken to the Story and Lahr cases. It is noted, with brevity, that "the *judgments* in Story v. N. Y. El. R. R., Lahr v. Met. R. R., *seem to compel this conclusion*," *i. e.*, that the "abutting owner," of this judgment, has "incorporeal private rights" in the street, the progeny of proximity.

But the reader will not lose sight of the elaborate and comprehensible logical processes whereby the prevailing judges, in the Story case, built up the theory of incorporeal hereditaments, in Front street, appurtenant to the plaintiff's lot, on the foundation of a covenant, running with the land, contained in a deed of the lot from the city as proprietor, or of the painstaking adaptation of that

<sup>1</sup> Nuis., 2d ed., p. 719, § 647.

theory to the eminent domain statute, in the Lahr case.

Though it is conceded that "importance was given" in the Story case, "to chapter 86 of the revised laws of 1813, under which the street was laid out," the fact is, that Front street was "laid out" by the city "prior to 1773."<sup>1</sup>

The thirty-second sentence says: "The learned Judges who delivered the dissenting opinions in Story's case, did not deny, but rather *assumed*, that the abutting owner had rights of property in the street, and *held* that those of the public were paramount, that the rights of both arose and existed by virtue of the same authority, and that those of the abutting owner could, by legislative and municipal action, be further subordinated to the rights of the public, for the purpose of affording additional and necessary facilities for the transportation of persons and property through the street."

The learned judges who delivered the dissenting opinions, based their denial of Story's right to maintain his action on the ground that *no private property*, in the street, *was taken* by the elevated railroad; and it was manifestly a necessity, in order even to the assertion of such a negation, to "assume," *causa argumenti*, that such property *existed* there. But it will be remembered that the highly differentiated personage—the "abutting owner," of this judgment—was unknown to the imagination of jurists at the time when the Story

<sup>1</sup> 90 N. Y. 144, 163.

case was decided; so that, when the former of the judges, who wrote the dissenting opinions in that case, remarked that he did not "deem it necessary to define precisely what property rights *abutting owners* have in the streets of the City of New York adjoining their lots,"<sup>1</sup> he doubtless had in mind the plight of the vast majority of such owners, in that city, whose lots abut on streets laid out and opened under the Act of 1813. Besides, any discussion of the rights of owners, whose legal situation differed from that of Story, was *obiter*.

The Opinion cites later intimations of the Highest Court, on "questions *akin* to the one under consideration," consisting of three *dicta* from the Mahady case, the Pond case, and the Powers case, respectively.

1.—The *dictum* from the Opinion in the Mahady case. The action, in that case, was brought against the Bushwick Railroad Company, a corporation having a surface railroad in Brooklyn, for an injunction restraining the defendant from using a siding in Bergen street, which, as alleged, was constructed without lawful right or authority, and cut off access to the plaintiff's lots; and for damages. The court, assuming that the judgment appealed from, which was in favor of the plaintiff, was based solely upon the ground of an *unreasonable* use of a *lawful* track, reversed the judgment for error in charging the jury that, in assessing the damages, they were to assume that the siding was constructed *without* lawful right. It is difficult to conceive of

<sup>1</sup> 90 N. Y. 186.

an instance where the relation of a *dictum*, to the question to be decided, should be more tenuous. Still the *dictum* stands; and it is to be remembered, that the "abutting owner," therein mentioned, was not the "abutting owner," of this judgment, and that the way in which abutting owners, on streets in Brooklyn, the fee of which is in the city, are classed with Story, is inconsistent with the subsequent solicitude of the Court in the Lahr case <sup>1</sup> to find a rational ground to support a theory of the origin of property, in the street, belonging to the plaintiff.

2.—The *dictum* from the opinion in the Pond case. That was a common law action, brought by the owner of premises abutting on a street in the City of New York, *laid out under the Act of 1813*, against the Metropolitan Elevated Railway Company, whose railway had been constructed through the street, to recover damages accruing from the interruption of light which theretofore passed to plaintiff's premises from the street. The point decided by the Court was, that the plaintiff could not recover "complete damages once for all," in such an action. The *dictum*, which is quoted in the thirty-fifth sentence, reads: "The Story case established the principle that *an abutting owner on streets in the City of New York* possesses, as incident to such ownership, easements of light, air and access in and from the adjacent streets, for the benefit of his abutting land, and that the appurtenant easements and outlying rights constitute private

<sup>1</sup> 104 N. Y.



property of which he cannot be deprived without compensation." It is axiomatic, that the Story case *could not* establish a principle broader than the foundation afforded by the peculiar facts in Story's title.

3.—The *dictum* from the opinion in the Powers case. That was an action brought against the Manhattan Railway Company, to recover damages alleged to have accrued by reason of the construction and operation of an elevated railroad in Division street, in the City of New York, in front of plaintiff's lot. The only point decided, in the second division of the Court of Appeals, was that the Court below erred in instructing the jury "that the failure of the defendant to institute condemnation proceedings before taking possession of the plaintiff's property, and before the trial of this action, entitled the jury to give exemplary damages, against them, should the jury so desire."

The *dictum* quoted in the thirty-sixth sentence, asserts that: "The facts of the Story case were not broad enough necessarily to cover the case of an abutting owner whose only property in the street was an easement for light, air and access, and hence *the right* of such owners to maintain actions for damages was not finally *set at rest* until the decision in *Lahr v. M. E. R. Co.*" The inability of the facts of the Story case to necessarily cover another case, is a circumstance apparently destitute of *legal* significance.

The thirty-seventh sentence, in stating, in its opening, that "the cases last cited did not, per-

haps, involve the question discussed in the remarks quoted," appears to make a guarded admission of the fact, that the three last preceding quotations consist of *obiter dicta*; but it is said that "it cannot be assumed that they were made without deliberation, for since Story's case this precise question has been much debated and hardly out of the minds of the Judges of the Court of last resort."

There is a pathetic, if not a more serious, aspect of this view, where the Judges, though "delaying justice to no man," yet, in daily preoccupation and nightly vigilance, are represented as wearily waiting to greet the coy, fugacious, orient easement! What wonder that, while absorbed in contemplation of Nirvāna, the overwrought judiciary threatened to sink under the weight of a merciless calendar, until the people spoke in their organic law, and the court was doubled?

Thus did the throes of parturient proximity call into commission the fresh judicial genius, to preside at the parthenogenesis of the street arab!

A pause will be made, to note some principles in the law of *dicta*. The assertion that "it cannot be assumed that they were made without deliberation," bears a resemblance to the encomium passed on certain remarks of the judges in the elevated railroad cases,<sup>1</sup> by DANFORTH, J., in the Story case,<sup>2</sup> where he said, of those remarks, that they "cannot be disregarded. They were made with deliberation . . . and evidently had influence in bringing about the decisions rendered. They

<sup>1</sup> 70 N. Y. 327, 361.

<sup>2</sup> 90 N. Y. on p. 418.

were thus more than *dicta*, they were part of the argument, and defined the boundaries by which, in the opinions of those judges, the Act of the legislature was kept within the limits prescribed by the Constitution." These judicial expressions are believed to contain the material for a classification of those wayside intimations, wherewith the tedium of relevant argument may be enlivened, as follows,—the several degrees of weight corresponding to the order of enumeration: 1st, *dicta* which are "more than *dicta*," which are made with deliberation, and which define boundaries; 2d, *dicta* which cannot be assumed to have been made without deliberation; 3d, *dicta* without any attributes, standing forth in their unadorned, innocuous imbecility. It is of the last class, presumably, that a writer, attempting a definition, says: "An *obiter dictum*, in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."<sup>1</sup>

The thirty-eighth and thirty-ninth sentences of the Opinion summon to the aid of the demonstration, *all* "the judgments for damages which have been recovered and sustained against the elevated roads." It is said: "The judgments for damages which have been recovered *and sustained* against the elevated roads do not, and cannot, rest on the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides, as before stated, a public nuisance does

<sup>1</sup> Old Judge.

not create a private cause of action, unless a private right exists and is specially injured by it. The only remaining ground, upon which they can, *and do stand*, is that by the common law the plaintiffs had private rights in the streets before the roads were built or authorized to be built." The "judgments," in question, are said to "have been recovered *and sustained*"; but whether the sustention was at the General Term or in the Court of Appeals is not stated. The new argument appears to consist exclusively of two conclusions: The first is the proposition that the elevated roads are not public nuisances; and the second is, that there is only one other ground upon which the judgments can "*and do stand*," viz.: on common-law, private rights of plaintiffs in the streets.

"We think it is clear that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads"; for "it is difficult to see" how property could be created for an abutter, in a street, by the incorporation of a railroad company, or by the erection of its structure, although these methods would have the advantage over propinquity, in the circumstance that *a date could be assigned* to the origin of the property. A less ready assent is accorded to the statement, that the abutter's rights do not "exist by force of the judgment in Story's case, but they existed anterior to," *i. e.*, before, "the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations,"—in

view of a subsequent declaration that "consequential damages have been by the Story easement transformed from consequential injuries into invasions of property-rights."<sup>1</sup>

The forty-first sentence opens with an ablative absolute clause: "*It being established* that an abutting owner has property rights in the streets (and that an action could have been maintained against the defendants for the recovery of the damages caused by their acts, had they been done without legislative authority), it becomes" in order to consider whether this property has been taken.

This is different from the form of the second of the "principal questions involved in this appeal," given at the commencement of the Opinion, inasmuch as the inquiry now propounded is—not, whether the defendants have "taken or materially impaired those rights, if any the plaintiff has, within the meaning of the Constitution," but "whether such right of action is cut off because the road was constructed pursuant to such authority."

Still, the substance of the question remains, for legislative authority could not justify the taking of private property without compensation.

This question is answered by the remarks that "Story's case and Lahr's case . . . hold that by the construction and operation of an elevated road in the street *in front of* an owner's premises, his *rights* are 'taken for public use,' within the meaning of the Constitution," (and) that: "It is

<sup>1</sup> Per FINCH, J., in *Am. Bank Note Co. case*, 129 N. Y. on p. 271.

*settled* by Story's case and Lahr's case that such rights as *the plaintiff* has in Pearl street are 'private property' within the meaning of the constitutional provision quoted.'

The plaintiff's property being found to have been "taken," and not paid for, the forty-fourth sentence truly says: "*It follows* that the authority conferred by the legislature to construct the road is not a defense to the action."

This *sequence* has a refreshing sound of finality which justifies an expectation that nought can remain except a declaration of unanimity of concurrence; but this is not to occur until the question whether an abutting owner has vested rights of light, air and access in a public street is further agitated and settled.

The Fobes case,<sup>1</sup> which had been recently decided, turned exclusively upon the question whether an easement, which *it was admitted* that plaintiff had, as an abutter, in a street in Syracuse, was "taken" by a steam railroad constructed on the grade of the street, and at about the natural surface of the ground; which was decided in the negative for the highly scientific reason, prevalent in New York, that the description of plaintiff's lot carried his ownership only to the side-line of the street; whereas, if the rails should be elevated, so that the locomotives could run overhead instead of over the people, the street would be unconstitutionally closed, *pro tanto*. After guarding against an unauthorized inference, from this decision, that

<sup>1</sup> 121 N. Y. 505.

propinquity does not produce property, the forty-eighth sentence gives the conclusion of the main argument:

"The conclusion which we arrive at is, that the erection and operation of the elevated road in Pearl street immediately in front of the plaintiff's premises in the manner and with the effect described in the findings of fact, was a material impairment of the plaintiff's right of property, for which he is entitled to recover compensation for the damages inflicted."

The plaintiff's property in Pearl street having been already held to be "taken" by the construction and operation of defendants' road, the additional conclusion, here arrived at, that the same property was "materially impaired" by the same acts, ensures the plaintiff's right of recovery, for nothing could be imagined more cumulatively injurious than a taking coupled with an impairment of the same property. The only illegality, however, here declared, is in the erection and operation of the road "*immediately in front of the plaintiff's premises,*" although "*in none of the cases,*" leading to this conclusion, were the obstructions or encroachments on or opposite to the property of the plaintiff. The conclusion is also silent upon the question, whether the plaintiff was entitled to an injunction—to procure which was the object of his action; while, in the statement of that for which the plaintiff is entitled to recover, there is some doubt as to the equivalent of the compensation referred to in the expression, a material im-

pairment of the plaintiff's right of property, *for* which he is entitled to recover compensation *for* the damages inflicted.

One of the minor questions involved in this appeal, arose out of the defense of acquiescence. According to the findings, although, "when the road was being built," the plaintiff forbade the company to construct it, he began no action until he commenced a suit; and he also occasionally rode on the road. The last sentence explains why the plaintiff was not prejudiced by this conduct. "Had this action been brought in equity solely for the purpose of compelling the defendants to remove their structure, and if all persons having such interests in the elevated road as would entitle them to be heard before such relief could be granted were parties to the action, personally, or representatively, this question might require some consideration; but in an action *for the recovery of damages*, the conduct of the plaintiff, as found by the court, and his delay in bringing the action, is not a defense."

The former clause sets forth the two-fold hypothetical condition under which the plaintiff's delay and fare-paying might have defeated his claim. The defense which was invited by, and based upon, these acts on his part "might require some consideration," if (1) the action had "been brought in equity solely for the purpose of compelling the defendants to remove their structure," and (2) other persons had been made parties defendant to the action.



As to the form and purpose of the action:

The action, having been brought, as has been seen, to procure an injunction,—*restitutio in integrum*,—was necessarily brought in equity, and since the injunction sought was one restraining the continuance of the maintenance and operation of the road, which restraint would inevitably have been effected by the removal of the structure, the action may be said to have been brought for the purpose of compelling the defendants to make such removal; but where the plaintiff preserved his bacon, so to speak, was in demanding, also, damages for the maintenance and operation in the past, which prevented the action from being one brought in equity *solely* for the purpose of compelling the defendants to remove their structure.

As to the parties defendant:

In order to lay himself open to the defense of delay and fare-paying, the plaintiff must not only have abstained from demanding "past damages" but he must have made "all persons having such interests in the elevated road as would entitle them to be heard before such relief" as the compulsory removal of the structure could be granted, "parties to the action either personally or representatively."

It was supposed that the stockholders of a corporation are made parties to an action "representatively" by impleading the corporation by name; and the plaintiff may have begun this action, or commenced this suit, with some such loose notion as that the stockholders of the defendants were

all the persons having such interests in the elevated road as would entitle them to be heard before the structure could be judicially demolished,—forgetting the bondholders whose security would be thereby diminished, the train hands who would lose their positions, the track walkers who might be killed by the fall, if Quirk & Snap were allowed to spring an injunction on the road *ex parte*, and finally the ticket owners, the obligation of whose contracts would be impaired: all of whom must be made parties to the action personally or not at all.

Had the plaintiff, then, been less grasping, and so waived his “past-damages,” as well as better advised, and so joined these necessary parties defendant, he might have received such “*consideration*” as would have lost him his case—a result, not wholly satisfactory, of the operation of the perfection of reason.

But it is noteworthy that, since the decision, no instance has occurred where a plaintiff, in an elevated-railroad-equitable “land-damage” action, has committed the errors of neglecting his “past-damages” and joining all the corporate bondholders, train hands, track walkers and ticket owners, with the corporations, as parties defendant; whence, the “abutting owners,” of every judgment, have been able to wait, ride and sue *ad libitum*.

“*πάντα ἐν μεταβολῇ.*”

M. ANTONIN., MEDIT.

## X.

### THE APPELLATE DIVISION, OR DIVISIONS, OF THE SUPREME COURT.

Are there more than one Appellate Division of the Supreme Court, under the New York Constitution of 1895?

The question is one of at least theoretic interest; it may be that practical and important results depend on the answer.

The primary inquiry is, whether the new Constitution creates more than one Appellate Division, or if not, whether it gives authority for such creation. If neither, then legislation creating, or attempting to create, more than one Appellate Division, would be subject to an inherent weakness—tending in the direction of unconstitutionality.

First, then, as to the provisions of the Constitution:<sup>1</sup>

“The Supreme Court is *continued*.”

We have, then, under the new regime (a) *no new* court, and (b) only *one* court.

This is a mere preliminary reflection. The clauses of the sixth article of the Constitution, on the precise question now mooted, may be arranged in three classes, viz., those (1) indicative of one

<sup>1</sup> Art. 6.

Appellate Division; (2) indicative of more than one, *i. e.*, four, Appellate Divisions; and (3) ambiguous.

### 1. AMBIGUOUS.

(1.) The very first reference to the new judicial phenomenon is ambiguous. It is said: "There shall be *an* Appellate Division of the Supreme Court." So far is plain sailing; but when it is added "consisting of seven justices in the first department and five justices in each of the other departments," the reader is left to choose between the competing constructions: (a) There shall be an Appellate Division of the Supreme Court in each of the four departments, consisting in the first of seven justices, and in each of the others of five; (b) There shall be an Appellate Division of the Supreme Court, consisting of twenty-two justices, seven to be assigned to the first department and five to each of the others.

(2.) It is next provided that "from all the justices elected to the Supreme Court the governor shall designate those who shall constitute the Appellate Division in each department, and he shall designate the presiding justice thereof." This does not *necessarily* mean that there is to be *an* Appellate Division in *each* department. It might be construed to direct the governor to designate, from the entire Supreme bench, those who should constitute *the* Appellate Division of the court, and to name, in the case of *each* appointee, the department in which he was to sit; or "the Appellate Division in each

department" might be taken to indicate four Appellate Divisions.

"The presiding justice *thereof*" seems to mean of the department, and not of the Division; for "the presiding justice *of the department*" occurs twice, later, in the same section.

(3.) "A majority of the justices designated to sit in the Appellate Division in each department shall be residents of the department." Besides, a construction which would make this imply the existence of an Appellate Division in each department, is one which would make it require a majority of the justices (constituting the one Appellate Division) who shall be assigned to sit in any one department to be residents of the department.

(4.) "The justices of the Appellate Division in each department shall have power to fix the times and places for holding special and trial terms." This might either (1) refer to an Appellate Division in each department, or (2) be a direction to the justices in (*i. e.*, assigned to) each department. The latter construction is favored by a portion of the same sentence, where the power is given "to assign the justices in the departments" to hold terms.

(5.) "The justices of the Appellate Division in each department shall have power to appoint and to remove a clerk." <sup>1</sup> Possible meanings: Either (1) an Appellate Division in each department, or (2) the Appellate Division justices (sitting) in each department shall have power, etc.

<sup>1</sup> § 19.

## 2. INDICATIVE OF ONLY ONE APPELLATE DIVISION.

(1.) The governor may "make temporary designations in case of the absence or inability to act of any justice *in the Appellate Division*." <sup>1</sup>

(2.) "No justice *of the Appellate Division* shall exercise any of the powers of a justice of the Supreme Court other than those . . . pertaining to the *Appellate Division*," etc.

(3.) "*The Appellate Division* shall have the jurisdiction now exercised by the Supreme Court at its *General Terms*."

(4.) "No judge or justice shall sit in *the Appellate Division* . . . in review of a decision made by him," etc.

(5.) "No unanimous decision *of the Appellate Division* of the Supreme Court that there is evidence . . . shall be reviewed by the Court of Appeals. . . ." Appeals may be taken as of right, only from judgments or orders entered upon decisions of *the Appellate Division* of the Supreme Court."

(6.) The clerks of *the Appellate Division* shall receive compensation to be established by law, etc.<sup>2</sup>

## 3. INDICATIVE OF FOUR APPELLATE DIVISIONS.

(1.) "Whenever *the Appellate Division in any department* shall be unable to dispose of *its* business within a reasonable time, a majority of the presiding justices of the several departments" may transfer appeals. It appears undeniable, that the

<sup>1</sup> § 6.

<sup>2</sup> § 19.

"business," in any department, is exclusively that of the judicial body therein; hence, a division in each department.

(2.) Certain local appeals shall be heard in the Supreme Court in such manner as the *Appellate Divisions* in the respective departments . . . shall direct.

(3.) "*The Appellate Division* in any department may, however, allow an appeal upon any question of law," etc.

It is believed that a careful study of the foregoing quotations from the new organic law will lead to the conclusion that such law presents a possible field for future judicial doubt and construction on the question whether it provides for one, or for more than one, Appellate Division of the Supreme Court, in case such a question shall arise in any case, and involve practical results.

We now turn to the acts of the legislature, and shall hardly wonder if that body found itself unable to avoid all ambiguity in attempting to carry out the intent of a Constitution presenting the peculiarities of phraseology which have been noted.

Laws of 1895, chapter 946 is an act containing numerous amendments of the Code of Civil Procedure, many of them having for their objects to conform that code to the new Constitution. It affects more than 200 sections of that code; to some of these sections, as amended by the act of 1895, reference may be made. The amendments may be conveniently classified in like manner as the clauses of the new Constitution.

1. INDICATIVE OF FOUR APPELLATE DIVISIONS.

SEC. 2. "*Courts of record enumerated.* Each of the following courts of the State is a court of record. . . . 3. The Appellate Division of the Supreme Court in each department. 4. The Supreme Court." Here we have five courts of record declared to exist. The mathematical reader will be puzzled to determine the relation between the *whole* and *its parts*.

Sec. 21. "The Appellate Division of the Supreme Court, in any department," may order papers destroyed.

Sec. 56. Board of examiners to certify successful candidates "to the Appellate Division of the Supreme Court of the department in which" the candidate resides, etc.

Sec. 89. "The justices of the Appellate Division in each department" shall appoint a clerk.

Secs. 135, 144. "The presiding justice of the Appellate Division of the Supreme Court of the first department."

Sec. 190. The Court of Appeals has jurisdiction to review certain determinations of "the Appellate Division of the Supreme Court in any department" (subd. 2).

Sec. 220. "There shall be *an* Appellate Division of the Supreme Court in each judicial department hereby created, consisting of seven justices in the first department and of five justices in each of the other departments." Compare this with the corresponding declaration of the Constitution.



Sec. 225. "The terms of the Appellate Divisions of the Supreme Court are to be appointed," etc.

Sec. 226. "An appointment of a term or terms of an Appellate Division must be made," etc.

Sec. 232. "The justices assigned to duty in the Appellate Division of each department."

Sec. 234. "Extraordinary terms of the Appellate Division of the Supreme Court in any department.

Sec. 245. The Supreme Court Reporter must be appointed and may be removed "by the justices of the Appellate Divisions of the Supreme Court, or a majority of such of them as attend," etc.

Sec. 246. "The justices of the Appellate Divisions of the Supreme Court must meet in Convention."

Sec. 1344. "The Appellate Division of the Supreme Court in the fourth judicial department, . . . the justices of the Appellate Division of the fourth judicial department."

## 2. INDICATIVE OF ONLY ONE APPELLATE DIVISION.

Sec. 17. "The justices assigned to *the Appellate Division* of the Supreme Court" are to meet in convention at Albany and frame Rules of Practice. The convention "must . . . adopt a seal for *each department of the Appellate Division* of the Supreme Court.

Sec. 190. The Court of Appeals has jurisdiction to review "the actual determinations made by the Appellate Division of the Supreme Court."<sup>1</sup>

Sec. 191. "No unanimous decision of the Ap-

<sup>1</sup> Subd. 1.

pellate Division of the Supreme Court . . . shall be reviewed by the Court of Appeals."

Sec. 223. "A designation of a justice of the Appellate Division of the Supreme Court must be in writing," etc.

Sec. 242. "A term of the Appellate Division of the Supreme Court must be attended by the sheriff of the county," etc.

Sec. 792. "Where a writ of mandamus . . . has been issued from the Appellate Division of the Supreme Court."

Sec. 1000. "Exceptions ordered to be heard by the Appellate Division of the Supreme Court."

Sec. 1227. "A motion for a new trial made at the first instance at a term of the Appellate Division of the Supreme Court."

"Title IV. Appeal to the Appellate Division of the Supreme Court."

### 3. AMBIGUOUS.

Sec. 230. "In each department four of the justices of the Appellate Division of the Supreme Court shall constitute a quorum."

Sec. 231. "Where in any case four justices of the Appellate Division in any department are not qualified," etc.

Sec. 248. "In each cause heard by *the* Appellate Division of the Supreme Court, the attorney . . . must deliver to the clerk of *said* Appellate Division," etc.

Sec. 2070. "Where the application is to the Appellate Division, by the Appellate Division, or a

justice of the Appellate Division of that judicial department."

It is unnecessary to quote further from the amendments of the Code of Civil Procedure, effected by chapter 946 of the Laws of 1895, to illustrate the great variety of diction, in the references to the reorganized Supreme Court. The climax of contrasts seems to be reached in references to departments of the Appellate Division and Appellate Divisions of the departments.

It may be, that no serious consequences will arise from what is undeniably a striking looseness of expression in so important a document as the Constitution, and which is emulated in the legislation of 1895.

The philosophic student will reflect that the confusion may have been occasioned by the metamorphosis in the use of the now time-honored expression—"the General Terms" of the Supreme Court. Properly mere *sittings*, they had come to be viewed as the *court* itself. In the substitution of "Appellate Division" for General Term or General Terms is notice that we have to deal with *the tribunal*, or a portion thereof, and not a Term.

*"The part is not greater than the whole."*

EUCLID.

## XI.

### A LIMITED LIMITATION.

In the classic vale of Runnemedede, June 15th, 1215, A. D., John Plantagenet, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and earl of Anjou, to his Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Governors, Officers, Bailiffs and his faithful subjects, in battle-line assembled, swore, on his solemn oath, confirmed by the Great Seal of England, *inter alia*: "*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam.*" <sup>1</sup>

This constitutional exemption from the sale, denial or differentiation of right or justice migrated, in the Mayflower, to these western shores, where, in the course of human events, according to the unanimous declaration of the original "thirteen," all men are created equal, especially since 1865; but, in consequence of an omission on the part of the Bishops, Barons, Justiciars, *et al.*, to add a *fourth term*, the faithful subjects there, and autonomous citizens here, were not fundamentally protected against another peril—delay—in the administration of the remedies described by the alternative phrase,

<sup>1</sup> Magna Charta Regis Johannis, XL, 30.

"right or" (and) "justice," the results whereof have descended to our own day.

The difficulty appears to have originated in the habit of the High Court of Justice, the *Aula Regia*, of following the King's person, wherever he went,—*ubicunque fuerimus in Anglia*; the suitors, in those early and often troublous times, not being always able to catch up. So, the device was hit upon, of having the high court stop at Westminster. But, this proving ineffectual, on account of the hardship, to the suitors and barristers, of coming up to court, from the distant parts of the realm and Ireland, justices in eyre, *justiciarii in itinere*, were commissioned to travel around into the counties, and there hold the familiar *nisi prius* courts, "to try by a jury of the respective counties the truth of such matters of fact as were under dispute in the courts of Westminster Hall."<sup>1</sup>

An adaptation of this precedent, in this country, was the practice of "riding the circuit," formerly in vogue;<sup>2</sup> and it may be that the impossibility of reaching a jury trial, in New York, within three years after joinder of issue, is in part due to the abolition of those ancient and useful tribunals, the Circuit Courts, by the People, in their Constitution of 1895. Some have been disposed to lay a portion of the *onus* on the bench,—pointing to what they describe as the long vacations; while

<sup>1</sup> 3 Blacks. Comm. 57.

rule, the Court and attorneys were

<sup>2</sup> *Vid.* THE BAR, February, 1906. provided with twenty-one meals of —"The Circuit Rider:" Reminiscences of Judge Russell, of Michigan; one of which was, that, "as a

pigeon, a week," at the only hotelry.

others inculcate the bar, and cite the recurrent phenomena of applications for a *continuance*, when cases are called for trial, based on the ground that counsel is "actually engaged" in another court, or elsewhere.

Counsel have customarily managed to evolve—roll from under—the infliction theoretically attending this kind of lawyers', not the law's, delay, by submitting their clients to be mulcted in "term-fees" (\$10, a month), and other imaginative legal expenses, currently but enigmatically denominated "costs." But a more subtle species of procrastination, constituting in fact a habitude (with which no lawyer has ever been charged), manifesting itself as early, perhaps, as the first century, was, and is, the conduct, or, rather, non-conduct, of suitors themselves, who, sporadically, and moved thereto by divers causes, although persuaded that they were in possession of a *cause* of action, delayed to act. These delinquents were said, in technical metaphor, to indulge in "sleep upon their rights"; which somnolence the Chancellor, more or less frequently, according to the length of his shoe, visited with an application of the maxim: "*vigilantibus, non dormientibus, jura subveniunt.*"<sup>1</sup>

As intimated, Courts of Equity, from the earliest times, frowned on the enforcement of what they called "stale claims";<sup>2</sup> declaring the possessor of them to have been characterized by "laches"; whence arose a practical *limit*, to a remedy in those

<sup>1</sup> *Vid. Bouv. Law Dict., sub. tit., "Maxima."*

<sup>2</sup> *Piatt v. Vattier*, 9 Peters, 415, 416.

judicatures, in respect of a right which had existed for a long time,<sup>1</sup> *durante longo tempore*. Equity, however, in its theory, was, by definition, merely the correction of that wherein the Law,—that perfection of reason,—by reason of its generality was deficient; and the great majority of applications for judicial interposition were made to a court of law, in which, originally, rights were immortal—with certain exceptions occasioned by death.

Eventually, however, the law, contrarily to a standing equitable maxim, followed equity,—a series of arbitrary, statutory prohibitions being enacted, against the allowance of a legal *action* after the lapse of a certain time, independently of any theory of laches, and not based upon any presumption of invalidity. After the establishment of this system, equity, resuming its normal and traditional bent, resolved to follow the law,<sup>2</sup> the result being an entertaining, juridical merry-go-round.<sup>3</sup>

By 32 Hen. VIII, ch. 2, it was enacted, for example, that “all formedons in reverter, formedons in remainder, and *scire facias*, upon fines of any mannors, lands, tenements or other hereditaments, shall be sued and taken within fiftie years next after the title and cause of action fallend, and at no time after the said fiftie years passed.” Under this vig-

<sup>1</sup> *Vid.* Waddell v. U. S., 25 Ct. 334). “As the statute of limitations is a bar at law, it is also a

<sup>2</sup> *Vid.* Kane v. Bloodgood, 7 Johns. Ch. 90, 113. bar in the Surrogate’s court, or in a court of Equity” (Matter of Rogers,

<sup>3</sup> “The rule applies as well to a court of equity as a court of law” (Matter of Gall, 153 N. Y. 316, 320; 182 N. Y. 270, 276). (Tasewell v. Whittle, 13 Gratt. 329,

orous legislation, it will be seen, if a reversioner, for example, should wait more than half a century, to bring his formedon, he ran the risk of finding his mannor barred. The statute cited, and others passed in subsequent reigns, being partial in their enumerations, were at length superseded by that of 21 Jacq. 1, ch. 16, which came across the Atlantic, with other relics of the Common Law, and, although modified by 3 & 4 Will. IV, ch. 27, constitutes the type of legislation, on the subject of the abatement of judicial remedy, in the States of the Union, generally. In the New York code of civil procedure, the statutory rules governing the acquisition of title to real property by adverse possession, and those of limitation, proper,—merely barring actions after the lapse of specified periods of time,—are clubbed together in one chapter,<sup>1</sup> under the caption: “Limitation of the time of enforcing a civil remedy.”

Two prominent points of interest, in reference to these “statutes of repose,” are (1) the identification of any given statute, as being a true “statute of limitation,” *i. e.*, one limiting the time for commencing an action, and (2) the rule which sprang up, and became will-nigh universal, that, in order to avail himself of the bar, imposed by such a statute, a defendant, sued, must plead the statute.<sup>2</sup> In

<sup>1</sup> IV.

36 Barb. 628; Robbins v. Harvey,

<sup>2</sup> That a statute which limits the time for commencing an action cannot be availed of, without a plea, setting it up, *vid.*: Bihin v. Bihin, 17 Abb. Pr. 19; Sands v. St. John, 5 Conn. 335; Parker v. Ivin, 47 Ga. 405; Tazewell v. Whittle, 13 Gratt. 329; 344; Cotton v. Maurer, 3 Hun, 552; Borders v. Murphy, 78 Ill. 81; Robinson v. Allen, 37 Iowa, 27;



other words, the statute says, an action *must* be commenced within a specified time; but it is not true, unless the defendant, when sued, says that the statute says so.

1. The subject of statutory limitations of actions is, on principle, to be distinguished from, *inter alia*, that of adverse possession, which looks to the acquisition of title by affirmative acts; from the doctrine of presumption of payment, or satisfaction, arising from the lapse of time; and from the subject of statutes operating a limitation affecting merely an incident of an action, exclusive of the time of its commencement.

Says a leading writer, at the opening of his work: "Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced; and those statutes which merely restrict a statutory or other right do not come under this head, but rather are in the nature of conditions put by the law upon the right given. Thus, a statute that prescribes the term of court at which the indorsee of a note is required to sue the maker in order to hold the indorser liable, or the time within which writs of error shall be brought, or a statute which fixes the time within which lands sold on execution may be

*Hitchcock v. Harrington*, 6 Johns. Penn. St. 100; *Boggs v. Bard*, 2 290, 296; *Davenport v. Short*, 17 Rawle, 102; *Rivers v. Washington*, Minn. 24; *Sears v. Shafer*, 6 N. Y. 34 Tex. 267; *Fairchild v. Case*, 24 268; *Pegram v. Stoltz*, 67 N. Car. Wend. 381; *Peck v. Cheney*, 4 Wisc. 144; *Heath v. Page*, 48 Penn. St. 249, 251; *Taxbox v. Supervisors*, 130, 142; *Wisecarver v. Kincaid*, 83 34 Wisc. 588.

redeemed, or within which a judgment or other lien shall be enforced, or which merely postpones a claim unless enforced within a certain time, or which provides that *a certain class of evidence shall be admissible* if action is brought within a certain time,—are not statutes of limitation within the legal sense of the term, and consequently are not affected by any Act suspending, extending or repealing such statutes. But statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are statutes of limitation, although they merely act on the remedy, and do not extinguish the claim.”<sup>1</sup>

The essence of a true statute of limitation, meaning one limiting the time within which an action must be commenced, is exhibited in two several sections of the New York code of civil procedure.<sup>2</sup>

A limitation of time involves the concept of a specified period of time, *i. e.*, a period beginning or terminating at a certain point of time. In the English statute, 21 Jacq. I, ch. 16, § III, the point of reckoning is substantially the same as in New York: “and the said actions for account, and the said actions for trespass, debt, detinue and replevin . . . shall be commenced and sued . . .

<sup>1</sup> Wood on Limitation of Actions, “§ 388. An action, the limitation of which is not specially prescribed § 1.

<sup>2</sup> “§ 380. The following actions in this or the last title, must be commenced within the following periods after the cause of action has accrued” (legal actions). able actions).

within six years next after the cause of such actions or suit, and not after."

Though the orientation of statutory limitation of the time for commencing an action is in the asserted unconscionability of seeking a judicial remedy after the lapse of the time limited, the singular doctrine grew up, that it was unconscionable for a defendant to avail himself of the statute bar;<sup>1</sup> whence, the rule—which became inexorable<sup>2</sup>—that he could not creep out of his obligation on the ground of mere lapse of time, unless he pleaded the statute, or, in the language of the Code-Procedure, set it up, in his answer to the complaint. Not only so, but the form of the plea, or answer, acquired, under the decisions, a procrustean tenor, a departure from which was fatal.<sup>3</sup>

These regulatory principles:—the necessity of interposing a plea or answer; the restriction of the same to a single, and alone permissible, form; and the confinement of the two former to an action-limiting statute, proper, *i. e.*, a statute limiting the time within which an action must be commenced,—formed an inseparable company.

At first, after the law and equity got running smoothly in their reciprocating grooves, a tendency, dear to biology, and common in the case of luxu-

<sup>1</sup> Mitford, Ch. Pleading, 6th Am. ed., 312, n.

<sup>2</sup> If he forget to plead the statute, he may not obtain leave to amend (Clinton v. Eddy, 54 Barb. 54); but see McQueen v. Babcock, 3 Keyes, 428.

<sup>3</sup> "The answer pleads that it" (the right of action) "did not accrue within six years before the commencement of the action. That was enough" (Piper v. Hoard, 107 N. Y. 67, 72).

riant vital growths, to differentiation in the form of the plea, discovered itself in the two jurisdictions, severally. The legal pleader alleged that the plaintiff's alleged cause of action *did not* accrue within (*infra*) the required period; while the equitable orator, with many a protestation, set forth that the complainant's grievance *did* accrue without or beyond (*supra*) the time limited.<sup>1</sup> But, as that which was without was certain to be not within, this discrepancy did not lead to any conflict in principle.

The form of the plea, or answer, rendered inevitable the confinement of the rule, making it imperative to plead the defense, to statutes limiting the time for commencing the action or suit. The defendant was required to allege, in pleading, the equivalent of *actio non accrevit infra (sex) annos*.<sup>2</sup> It was not sufficient to plead "that the

<sup>1</sup> LAW: "*Et prædictus defendens* complained. And this the said defendant is ready to verify" (Stephen on Pleading, 154).

*dicat quod prædictus querens actionem suam prædictam versus eum habere non debet, quia dicit quod billa prædicta exhibita fuit XXIV Octobr. Anno regni divini Caroli Secundi, decimo tertio, et non antea, quodque ipse idem defendens ad aliquod tempus infra sex annos ante diem exhibitionis billæ prædictæ non assumpsit*" (*Liber Placitandi*, 61; 1674, A. D.).

"And the said defendant, by his attorney, says that he, the said defendant, did not, at any time within six years next before the commencement of this suit, undertake or promise in manner and form as the said plaintiff hath above

EQUITY: "And this defendant, for further plea, saith that, if," etc., "such cause of action or suit did accrue or arise above six years before the filing of the complainant's bill of complaint, and above six years before serving or suing out process against this defendant to appear to and answer the same bill" (Equity Draftsman, 4th Am. ed., 655).

<sup>2</sup> Angell on Limitations, 6th ed., 312; Fisher v. Pond, 1 Hill, 672; Bell v. Yates, 33 Barb. 627; 2 Chitty on Pleading, 450. "*Non assumpsit infra (sex) annos*" could be

claims of the plaintiff are stale and outlawed demands, and lost by the laches of the plaintiff . . . and the defendant claims the benefit of all statutes or rules of law or equity which may be invoked for the purpose of resisting the same";<sup>1</sup> nor "that more than six years has elapsed since the matters and things mentioned in plaintiff's complaint, or any of them, have become due."<sup>2</sup> It was even perilous merely to state *too many* years, in the pleading, as shown by the remarks, made by the court, concerning a plea, that "eight<sup>3</sup> years have elapsed since the accruing of the right of action upon the said several four promissory notes set forth in the complaint, and this defendant pleads the statute of limitations as a defense thereto."<sup>4</sup>

In 1881, on the steps of the Capitol, at Albany, the Comptroller of the State of New York, pursu-

pleaded, instead of "*non accrevit*," defendant pleads the statute of etc., where the cause of action limitations thereto." The form of arose when the promise was made this plea having been objected to, (Peck v. Cheney, 4 Wisc. 249, 251). the court said: "It is claimed on

<sup>1</sup> Budd v. Walker, 3 Civ. Proc. R. 422, 424.

<sup>2</sup> Eno v. Diefendorf, 1 Silv. (Ct. of App.) 157, 160.

<sup>3</sup> Instead of "six."

<sup>4</sup> Camp v. Smith, 136 N. Y. 187, 190, 203. That was an action to recover the amount of four promissory notes, wherein the defendant, in his answer, alleged that "eight years have elapsed since the accruing of the right of action upon the said several four promissory notes set forth in the complaint, and this

the part of the plaintiff that the answer of the statute of limitations in this case is not sufficient because it alleges eight years instead of six as the time which had elapsed. The attention of the court upon the trial was not called to this alleged defect, and the objection now made is altogether too technical. If eight years had elapsed, certainly six years had, and the allegation was ample to give the plaintiff notice of the precise defense relied upon."

ant to law and notice, sold a tract of some two thousand acres of wild, forest land, situated in the Adirondack region, for non-payment of taxes payable, but not paid, by its owners, non-residents of the town wherein the land lay, to the highest bidder, who, in 1884, received from the State a deed thereof in fee simple absolute. The land had been repeatedly sold and conveyed by the State, for like cause, in prior years; and the said grantee, knowing that these tax-titles were notably liable to attack from up-state attorneys, on technical grounds, took an extra string for his bow by getting a conveyance of the same tract from the State's grantee under a sale made in 1871. He then went on, paying his taxes on his forest investment for nearly a quarter of a century, when he unexpectedly got into some trouble with the Indians.

In 1894, an aboriginal body, created, organized and existing for a purpose known to the law as *campi partitio*, i. e., partitioning off, by an exceedingly high wire fence, a liberal portion of the terrestrial superficies, to the end that the *cervidæ* and other inferior species should not get out, and, incidentally, the *humanidæ*, with select exceptions, should not get in, though having its own lands, tenements, hereditaments and appurtenances, cast an admiring, not to say desiderative eye, upon the tract aforesaid; whereafter, by the aid of suitable legal advice, the suit of naboth *ads. nabob* waxed apace.

The action was brought in Equity, to cancel the State's two deeds, aforesaid, as clouds upon com-

plainant's title, the aboriginal having taken the precaution, just before service of the writ, and for the purpose of laying an equitable ground therefor, to buy up parts of some aged, alleged titles arising out of still earlier tax-sales, made in 1843 and 1859. The incursion and incumbency of the alleged cloud consisted in alleged, gross irregularities in the conduct of the rude forefathers of the hamlet,—the town assessors, up in the woods,—in the taxation leading to the sales of 1871 and 1881, prominent among which was, the fact that the owner had been allowed two, instead of one, year of grace, within which to pay \$2.13, the tax of 1869. Thereby, it was gravely contended, the aboriginal's property had been taken from it without due process of law.

The legislature, in 1855, had inserted, in the statute-book of that year, a provision, designed to ameliorate the chances of the State's grantee, on a tax-sale, of holding on to his purchase, as follows:

“Such conveyance shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, surveyor general or treasurer, and all conveyances hereafter executed by the comptroller of lands sold by him for taxes, shall be presumptive evidence that the sale, and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, according to the provisions of this Act, and all laws directing or

requiring the same, or in any manner relating thereto." <sup>1</sup>

This mild provision, in favor of the validity of the State's deeds of lands, sold for non-payment of taxes, left in full force the rule of law, that, "where certain proceedings are authorized by statute, in derogation of the common law, by which the title to real property is taken from the owner and transferred to another, every requisite of the Act having the semblance of benefit to the former must be strictly complied with. All these tax sales of real estate stand upon the footing of the execution of a naked power, and the proceedings preliminary to the consummation of the sale and transfer of the title are to be judged of accordingly." <sup>2</sup>

One of the applications of this stern rule was a case where, the law requiring the town assessors, in their oaths appended to the assessment roll, to state that they had estimated the value of the real estate in accordance with the judgment of a majority of them, "with the exception of those cases in which the value of said real estate has been changed by reason *of proof* produced before us," the unlettered scrivener of the forest, doubtless in copying the form of assessors' oath from a prior MS. precedent, inserted "hereof," in the place of the two words above italicized, so that the closing words of the expression ran: "changed by reason hereof produced before us." Result, the comp-

<sup>1</sup> L. 1855, ch. 427, § 65.

<sup>2</sup> Hubbell v. Weldon, Hill & D. Suppl., on p. 145.



troller's deed, founded on the taxation, was *held* void.<sup>1</sup>

To alleviate the hardships often thus resulting from the triumph of technicality over the claims of substantial justice, the legislature, in its wisdom, in 1885, amended said section 65 of the non-resident land-tax-law so as to read as follows:

"§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such *conveyances that have been heretofore executed* by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale, shall *six months after this Act takes effect*, be *conclusive evidence* that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served, according to the provisions of this Act, and all laws directing or requiring the same, or in any manner relating thereto. . . ."

<sup>1</sup> *Shattuck v. Bascom*, 105 N. Y. 39.

<sup>2</sup> L. 1885, ch. 448, § 1; passed June 9th, 1885, to take effect immediately.

The italics in the foregoing quotation call attention to certain features of this legislation having special pertinence to the case under consideration. The law was retroactive. It applied, by its terms, to the two State-deeds of 1874 and 1884. It assumed to constitute the deeds *conclusive* evidence that the sale and prior proceedings were regular. But this legislative transmutation of presumptive into conclusive evidence was not to take effect until "six months after this Act <sup>1</sup> takes effect."

The validity of this legislation was contested by the punctilious, including those who interested themselves in upsetting the State's tax-deeds, on the ground that it purported to change the title to property by a legislative *fiat*, and, in so doing, violated the inhibitions contained in both the State and the federal Constitution, by depriving the old owner, and his young grantees, of property "without due process of law." It was said, that six months were not a sufficiently long period to allow claimants, who wished to bring suit to upset tax-deeds, given by the State before June 9th, 1885, and which had been recorded for two years, to commence an action wherein they would merely be confronted by the old, innocuous rule of presumptive evidence of regularity in the taxation proceedings, instead of meeting with a conclusive presumption.

But this contention was not sustained, it being *held* that no one had a vested right in rules of

<sup>1</sup> This was construed to mean, six months after June 9th, 1885, and not to relate to the passage of the Act of 1855.

evidence; that the only constitutional restriction of the power of the legislature to alter such rules was the necessity of allowing a reasonable time for a change, which might be burdensome to a property owner, to take effect, after notice given by the passage of the mutative statute; this time being in the nature of "a limitation upon the taxpayer's right to assert his claims under pre-existing laws."<sup>1</sup> The constitutionality of the Act was again upheld between the same parties,<sup>2</sup> and, at length, by the Supreme Court of the United States.<sup>3</sup> Thus, it became definitely and finally settled, that six months, from June 9th, 1885, was a long enough time to allow for bringing an action to upset a deed from the State, with the destiny of finding only presumptive evidence of regularity, in plaintiff's way, on the trial. The statute, in no manner, limited the time for the commencement of an action. The action might be brought to cancel the State's deed, as a cloud on a former owner's title, on the ground of a fatally uncertain description of the property, purporting to be conveyed, contained in the comptroller's deed. Such an action was brought, and succeeded.<sup>4</sup>

The collimation of these principles and decisions, with the facts of the equity suit under study, thus

<sup>1</sup> *Peo. v. Turner*, 117 N. Y. 227. is whether property is thereby necessarily taken without due process of law" (*id.* 233, 234).  
"Considered as an Act of limitation, the only question in relation thereto is, whether such limitation is just,

<sup>2</sup> *Peo. v. Turner*, 145 N. Y. 451.  
and gives the claimant a reasonable opportunity to enforce his rights. 94.  
<sup>3</sup> *Turner v. New York*, 168 U.S.,

. . . Considered as establishing a rule of evidence, the only question  
<sup>4</sup> *Zink v. McManus*, 121 N. Y. 265.

appears. The complainant sued, in 1895, to cancel, as clouds on its title, two State deeds, of 1874 and 1884; it did not sue before December 9th, 1885. Hence, must it not expect, as to alleged irregularities within the description of the Act of 1885, to be confronted with *conclusive* evidence of regularity?

It has always been the law, that there is no statute of limitation prescribing the time within which an action to cancel a deed, as a cloud on plaintiff's title, must be commenced;<sup>1</sup> the principle being, that the proprietor of the cloud, so to speak, is engaged in a continuous trespass or nuisance; wherefore, a new cause of action accrues, in favor of the beclouded, every moment, as long as the cloud impends.

Therefore, to the complaint alleging fatal irregularities in the taxation proceedings, leading to the two State deeds aforesaid, and praying cancellation of them as clouds on plaintiff's title, defendant, the State's grantee, interposed a "general denial"; and both parties went into a vigorous trial, at the special term—the court of first instance—one, to upset the State deeds on the ground of irregularity in the taxation proceedings, and the other relying on his muniments of title as *conclusive* evidence of regularity; no question as to any necessity of pleading any statute of limitations being raised at the trial.<sup>2</sup>

<sup>1</sup> *Miner v. Beekman*, 50 N. Y. 343;    <sup>2</sup> The theory of the trial controls *Schoener v. Lissauer*, 107 *id.* 117; above. *Vid. Vann v. Rouse*, 94 *Jackson v. Kinsey*, 28 State R. 394. N. Y., on p. 407.

Defendant could not swear that the cause of action did not accrue within any number of years before the commencement of the action, without committing perjury; and he could not omit so to swear (he found), without losing his case. So he got beaten. For when he got as high as possible, still depending on the benignity of the Act of 1885, he discovered, for the first, and last, time, that "in so far as this statute has any application to this case, it is a statute of limitations and nothing else. This statute operates only as a bar to the remedy, and inasmuch as the defendant has not pleaded it in his answer it is not available as a defense. . . . The omission of the defendant to avail himself of the protection of the statute by a *proper pleading* is sufficient answer to his present contention."

Constrained by this rebuke, apparently, the State's grantee made his *remittitur*; surrendered the State's deeds for cancellation, his mouth being closed to defend that irregularity *in re* tax, of \$2.13, in 1869; paid over, to the corporation, in addition, the value of the tract, in satisfaction of its "costs and disbursements"; and then, like Samuel M. Clemens, at Nürnberg, after shattering a mirror, mistaken for a ghost, in the dark, he, probably, reflected (*Nehasane P. Assoc'n v. Lloyd*; 167 N. Y. 431).

"*Lato te limite ducam.*"

VIRG.

## XII.

### LEGAL NON-LOGIC.

It has been said, that, "by common consent, the appellation of 'learned professions' has been given to law, physic and theology." <sup>1</sup> Of these callings, the first named may be thought to possess immunities and affirmative advantages not shared by the others, in equal degree.

Of each it is, indeed, characteristic, that therein the mental, as distinguished from the physical, human energy is exerted, to accomplish ultimate results. But while the physician, considering the object of his art, in his diagnoses, his pharmacopœia, and his therapeutics, finds himself essentially and continually in confrontation with matter, and the divine meets with what may be deemed embarrassments of an opposite kind, in the ultra-spiritual nature of the sphere of his professional activities, calling into requisition imagination, hope, and even faith, to support and aid him in his ghostly ministrations, the legal practitioner, although, if aspiring, he needs dip deep in the wells of history, and, in order to gather and handle his *materiel*, perchance journey through divers fields of sublunary knowledge, receives his en-

<sup>1</sup> Essay on "The Study of the Law," by John Anthon, p. 17; 1832.

lightenment directly from the spoken or written word, and, throughout his processes, is exclusively engaged in the cold, colorless play of the intellect upon palpable, tractable facts.

The writer already quoted strikingly observes: "If mind, in all the splendor of its most powerful effort, can ever ennoble its possessor, here the true impress of nobility is to be found." <sup>1</sup>

The advocate, in what has been termed the Anglo-American system of procedure, must, it is true, collect, comprehend and co-ordinate the facts with which he deals, but these labors are merely subsidiary to the evolution of inferences of fact from facts, through the mediation of judicial arbitrament. The presentation of certain of his array to the adjudicating tribunal is sternly governed by a collection of time-honored, often technical, regulations; where opens the broad, historic field of Evidence, adjoining, and inseparable from, that of Pleading.

The antagonists plead in order to reach (or "raise") an issue, which it is not permitted directly to prove. Evidentiary facts are to be produced to the judex, who from them deduces the fact in issue, to which the magistrate applies the law. The processes of induction and deduction are thrice discernible, in the progress of the probative branch of the juristic art; and it is ever the same, whether occupied in elaborating rules, preparing for trial, or sitting in judgment. This, however, is subject to exception, in the first of

<sup>1</sup> *Id.* p. 18.

these three operations, whenever the legislative will interposes its imperious, unprincipled fiat, which the advocate must know, and the Court obey.

The current line of thought presents, for contemplation, the science, and the art, of (human) reasoning, and, fundamentally, the constitution of the human mind.

Adverting briefly, in the first instance, to the latter of these two topics, we inquire—what is the observed mode of working, and, therein, the constitution, of that wondrous mechanism, the essence of which is indeed as mysterious as is all life, but whose operations have been spread, as an open book, before the individuals of the race since the origin of time?

The question is not new or difficult. Numberless are the volumes embodying the results of the reflective process, whereby man gazes upon the unceasing action of his own spirit. Paradoxical though it might be deemed, while the outcome of this introspection is a philosophy of the mind, complete, certain and substantially uncontroverted, a striking contrast is presented in the character and evolution of physical science. The graduates of even recent decades have lived to witness the subversion of the conscientious and confident teaching of instructors, from whom it was learned, that the molecule in physics, and the atom in chemistry, constituted the impenetrable barriers, beyond which the human curiosity need not, nay, cannot pass, in the study of matter. But a Curie,



a Lodge, and their confreres, have unearthed facts, generating theories of marvellous motion, immeasurable in velocity, in infinitesimal orbits, of the *ion* and the *electron*, the mere tentative discussion of which employs a nomenclature, and necessitates methods of investigation, more baffling to the novice than the vagaries of the presidential new spelling. In the intellectual sphere, on the other hand, Aristotle looks down, through the ages, unperturbed in the immutability of his matchless expositions.

No apology will be requisite, for relying, in an attempt at a summary portrayal of the main facts in the human, mental constitution and action, on the dissertations of a distinguished professor, who, years before the end of the last century, looking across the borderland into an alien science, had a vision of the truth, and proclaimed that Matter is neither more nor other than Force.<sup>1</sup>

In the human constitution, are discerned three, mutually exclusive, and, collectively, exhaustive, Capacities of mind, viz.: capacities for cognition, emotion and volition,—the Intellect, the Susceptibility and the Will. In the Intellectual department, a careful inspection determines the existence of three Faculties, rising in dignity in the order of enumeration,—Sense, Understanding and Reason:

<sup>1</sup> "Science is fast getting hold of former notions of dead matter,—an the deep significance that matter inert matter, moved by force,—and can stand alone in extension, and say out, unequivocally, Matter is work out itself its successions; but Force." *Creator and Creation*, by just so far as science recognizes such Prof. Laurens P. Hickok, p. 150; truth, it is obliged to modify all Amherst, 1872.

whereof the respective, distinguishing characteristics are, that, by the first, the mind perceives external phenomena; by the second, connects phenomena in judgments (*noumena*); and by the third, arrives at universal and necessary principles—knows the absolutely true, beautiful and good—while also presiding, as regulator, over the operations of the other, and inferior, two faculties.<sup>1</sup>

The present interest is in an immediate consideration of the nature, and the mode of working, of the second of the intellectual faculties, enumerated, which, including among its activities the operations of memory, conception, association, abstraction, reflection, imagination and judgment, connects qualities in substance and events in cause, and—what is specially pertinent here—combines judgments in logical triads, under the guidance of the Reason; a process known as reasoning, or ratiocination.

In essaying an imperfect sketch of the last-named process, we enter the domain of that peerless prince of human intellects, who<sup>2</sup> is followed, *longo intervallo*, by a Bacon, a Bentham, Whately, Arnauld, Niel, Coppee, and a host of other master minds.

An explication of the processes of inference, or reasoning, wherewith the adduction of judicial evidence is so intimately concerned, can, perhaps, not be better given than by quoting the substance

<sup>1</sup> See Hickok, *Empirical Psychology*, Union College, 1854.

of reasoning (syllogism is only the Greek term for reasoning, or inference), he had no predecessor."

<sup>2</sup> "Aristotle himself boasts with truth that, in working out the theory Chambers' Encycl., *sub nom.*

of what has been written, on that subject, by a learned author already cited.

I. The Syllogism, proper. — To any *comprehensive* judgment, may be applied the principle, that what has been found true of the whole must also be true of all the parts. In this, an occasion is at once given for arranging conceptions in the order of the syllogism, and thereby attaining to particular judgments. The first or comprehensive judgment is termed the major premiss; the second or induced judgment, the minor premiss; and the third or deduced judgment, the conclusion. Though no augmentation of knowledge can be obtained hereby, since the major premiss already contains all that can be distributed in the conclusion, yet may the validity of particular judgments be thus determined. The conclusion is rendered distinct from all else that is comprehended in the major premiss, by the circumstance, that the judgment constituting the minor premiss involves what is known as the middle term. The authority of the conclusion can rise no higher than that of the judgment which is embodied in the major premiss. To establish the validity of the latter, it is necessary to attain it as a conclusion from some more comprehensive judgment, in a higher syllogism. The understanding could reach absolute truth only by an infinite series of syllogisms—which is impossible. That faculty of the intellect must hold on, in its endless march, and can never hang its latest syllogism, as it proceeds upwards, on the confirmed hook of an absolute premiss. Its stately

progress, from syllogism backward to pro-syllogism, may be called reasoning, but until Reason attains a universal and necessary principle, the reasoning has not its *root* in reason, but is mere logical deduction from assumed premisses.<sup>1</sup>

The Syllogism inverted.—The syllogism proper is essentially analytic, *i. e.*, proceeds from the whole to its parts. It is the true form of logical syllogism. But there is a reversed form, which may be used, and which is used, in connection with the process of induction, the same being wholly synthetic, *i. e.*, proceeding from the parts to the whole. Its validity depends upon the principle, that what is true of each of the parts is true of the whole.

In the syllogism proper, we say:

Major premiss—All matter is expansible by heat.

Minor premiss—Wood, water, iron, etc., are matter.

Conclusion—Wood, water, iron, etc., are expansible by heat.

In the inverted syllogism, we say:

First judgment—Wood, water, iron, etc., are expansible by heat.

Second judgment—All matter consists of wood, water, iron, etc.

Conclusion—All matter is expansible by heat.

As a logical formula, the latter is as truly valid as is the former, and, wherever it may be strictly applied, will give a valid judgment, in its conclusion, for the major premiss of a proper syllogism. It might thus appear, that a pro-syllogism abso-

<sup>1</sup> Hickok, *Empir. Psychol.*, p. 147 *et seq.*

lutely valid would in this way be attained for the analytic logic, and therein relief from the necessity of perpetually receding without finding an absolute major premiss. The end sought is, to reach an absolute, universal and necessary judgment; but this can never be attained by climbing the ladder of an analytic logic. The valid form demands *all* the parts of the universal, and this is of impracticable attainment. Thus all the conclusions in the inductive process are illogical, because, so long as it is impracticable to include the universal in the second judgment, a valid universal conclusion cannot be reached. No swing from deduction to induction relieves the ceaseless tread, for the induction of universals is yet endless. The value of the conclusion, in the inverted syllogism, is measured by the principle, that, the broader the induction, the greater the probability of the announced result. But even this is in the exclusion of the higher faculty of the *reason*. To the understanding, there is a mere probability of uniformity in nature—the result of a subjective habit. The inferring of a law of nature from any past uniformity is rising to the supernatural, and is quite above the province of the understanding. A true induction uses the higher faculty of the *reason*, cognizes that nature has laws, and never goes forth to any promiscuous collection of facts, but always with hypothesis in hand, fitting this on every fact examined, and only trying it on such facts as the hypothesis demands should fit into its archetypal conditions. Did not *reason, a priori*, determine that

nature has laws, and prompt to the adoption of an hypothesis of what the law, in a given class of facts, is, the *understanding* would never set out, on its errand of induction, and strive to gather so large a share of the facts as shall give plausibility to the inference of what the law is, for the whole. The syllogism, whether proper or inverted, can never give an absolute judgment, as its conclusion. The former can never say that the major premiss is proved: the latter, never, that the universal has been reached.<sup>1</sup>

The syllogism proper, sometimes (but always, it is submitted, improperly) called the deductive syllogism, is eminently the instrument of the mathematician, who, furnished with his definitions, and his axioms beheld by the clear intuition of reason, proceeds in stately march, through successive syllogisms, to the *demonstration* of particular truths, with the finger of unquestionable verity.

The inverted syllogism is the instrument of the physicist, the chemist, and, in general, of the investigators in the practical affairs of men;—of none more truly than of the applicant of the principles governing the adduction of judicial evidence. By its aid, they seek to reach the goal of *proof*.<sup>2</sup>

<sup>1</sup> Hickok, *Empir. Psychol.*, *supra*, is the following: M is P. S is similar to M. S is P. In so far as the

<sup>2</sup> "The true logical process, in logical connection between S and juridical as well as in historical P, in imperfect induction or analogy, reasoning, is imperfect induction, is uncertain, the conclusion has only or analogy. 'The inference of a problematic validity. If the reason- analogy is an inference from partic- sons for its existence are of more ulars or individuals, to a co-ordinate weight than the reasons against, the particular or invididual. Its scheme conclusion has probability (*proba-*

Only slight consideration satisfies, however, that the distinction implied in the use of the contrasted appellatives, the deductive, and the inductive syllogism, is spurious. Judicial reasoning, in the employment of evidence, is inference; and all inference is deduction. Aristotle did not invent reasoning; but discovered and elaborated a

*bilitas*). If an attempt be made, to define more closely the different degrees intermediate between the complete certainty of the conclusion and the certainty of its contradictory opposite, the term probability is also used in a wider sense, as the common name for the whole of these degrees. The degree of probability, in this sense, admits, in certain cases, of mathematical determination, which may have not only probability but certainty. When different analogies, some of which point to the conclusion, and the others to its contradictory opposite, are in general alike applicable, the degree of probability may be represented mathematically as a fraction, whose numerator is formed by the number of cases for, and its denominator by the number of cases compared. So far as the different analogies differ in the degree of the possibility of their finding application, a mathematical determination of the degree of probability is generally impossible. In this case, a less exact valuation of the degree of probability may be arrived at, which can lay claim to probability only, not to certainty. This kind of valuation of the degree of probability is commonly called the philo-

sophical, in opposition to the mathematical; but more correctly the dynamic, in so far as it depends upon the relative consideration of the internal force of the causes for and against' (UEBERWEG, *System der Logik*, Bonn, 1857, § 132). The fallacy which underlies the confusion of demonstration with proof may require a more technical exposition. Demonstration is a conclusion drawn from a universal major premiss, producing a certain conclusion; proof is a conclusion drawn from a particular major premiss, producing a probable conclusion. Thus, we say, all A is B; C is A; therefore, C is B. . . . This is a demonstration, and admits of no degrees of certainty, being necessarily true. On the other hand . . . we may say, some of the railroad investments made before the panic of 1872 have proved worthless; A made certain investments in railroads prior to such panic; therefore there is a probability that some of these investments, made by A, have proved worthless. It is obvious, that the conclusion is one admitting of various degrees of probability." Wharton, on Evidence, 3d ed., 1888, §§ 6, 7.

law of the normal working of the human mind. Hence, in what has been, above, denominated the syllogism inverted, the process is one of deduction, the idiosyncrasy being, that, in the inferential *cursus*, the laws of logic are defied, to an extent, from necessity imposed by the conditions. Every valid argument consists of one or more sets of three propositions, each of which sets either commences with a universal proposition, or is transmutable, by reduction, to a form wherein it will so commence. In the practical investigations of life,—notably in the adduction of judicial evidence,—it being impossible to obtain this universal, as a starting thesis, the reasoner treats a selected, particular premiss, made as broad as possible, as if it were universal, and nonchalantly proceeds to deduce a universal conclusion; therein indulging in the fallacy of an “undistributed middle” term. The result is a position which is not necessarily untrue, but which is unproved. No doubt is admissible, in respect of the predication that Cæsar was mortal, given the *data* that all men are mortal, and that he was a man. But, when the legist invites the deduction of a universal conclusion from a particular major premiss, he enters the region of “moral certainty,” and trusts to the wisdom of the sages of the jury-box to render a “true verdict,” by dint of, in civil cases, weighing the major against the minor doubt, and yielding to a reasonable doubt, in favor of one accused of dereliction.

It appears, from these hasty references to well-known principles, that the structure of judicial



evidence is effected by reasoning; that this process is conducted jointly by the intellectual faculties, known as the *understanding* and the *reason*; the former selecting and asserting, in pairs, sets of judgments, from the combination whereof the latter asserts that a specified conclusion *must*, as a matter of greater or less probability, follow. Reason does not reason, but only aids in the operation; and the like is true of the understanding.

It thus appears, that the law of judicial evidence, in respect of its administration, is illogical, in its marrow; that, while the reasoning follows, in a manner, the scheme of the analytic logic, the conclusions reached are not demonstrative, but mere predications of probability.

Is this same law of evidence, in its structural constitution, in aught affected by the same characteristic of illogicality? This inquiry must be answered in the affirmative, if it be found to be true, that, in the assemblage of judicial and legislative rules which have been established, and which differentiate the judicial from the natural course of reasoning, there is any whose effect is, to impose the adoption of a major premiss, not to be reached by any process of deduction or induction, and which, though received and employed on authority, the highest faculty of the intellect rejects as irrational.

The merits of the existing code, the creature of judicial and formal "legislation running through a dozen centuries,"<sup>1</sup> have been differently esti-

<sup>1</sup> Thayer, Prelim. Treatise on Evidence, p. 327.

mated. In the opinion of certain, that body of rules constitutes the acme of result of human effort in devising a scientific method of attaining the practical ends, primarily of the administration of justice, and subordinately of the elicitation of truth; while, according to others, they survive in "the last stage of caducity."<sup>1</sup>

"No circumstance in the frame of our legal polity does more honour to the wisdom and equity of our municipal institutions, than the principles and rules concerning evidence. None is more connected with the sublime principles of moral and political science, and the knowledge of human nature; none more interesting to the gentleman and the scholar, from its analogy to the rules of the most civilized and greatest of the nations of antiquity; more awakening to the inquisitive mind, wishing to understand the sources of our establishment; or more important to every one who partakes of our constitution, as a government of laws administered on fixed principles."<sup>2</sup>

"The law of evidence, as has been seen, is almost exclusively composed of exclusionary rules, and these rules, as already there has at least been seen reason to suspect, almost exclusively absurd and mischievous."<sup>3</sup>

Whether the eulogy or the accusation meet with assent, there is a *consensus* of judgment, to the effect that the law in question includes a for-

<sup>1</sup> Bentham, *Introduc. to Rationale of Jurisprudence*, ch. 12, § 12, 2.

<sup>2</sup> *Law of Evidence*, Lord Chief Baron Gilbert, *pref.*, xxii; 1795.

<sup>3</sup> Bentham, *Introduc. to Rationale of Jud. Evidence*, ch. 32, *ad init.*

midable array of exclusory rules—rules rejecting premisses which would find a place in the arguments of ordinary, every-day reasoning. Bentham, as quoted, considers the law to be almost exclusively composed of such rules; in this agreeing with another jurist who asserts that “the great bulk of the law of evidence consists of negative rules, declaring what, as the expression runs, is not evidence.”<sup>1</sup>

“The law of evidence . . . chiefly . . . determines, as among probative matters, matters in their nature evidential,—what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence. . . . What has taken place, in fact, is the shutting out, by the judges, of one and another thing, from time to time; and so, gradually the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules.”<sup>2</sup>

Best is more explicit and detailed, saying: “Judicial evidence . . . is a species of the genus, ‘evidence,’ and is, for the most part, nothing more than natural evidence restrained or modified by rules of positive law. Some of these rules are of an exclusionary nature, and reject, as legal evidence, facts in themselves entitled to consideration. Others again are what might be called

<sup>1</sup> Stephen, *Digest of Law of Evidence*, Introduc.

<sup>2</sup> Thayer, *Prelim. Treatise, evidence*, pp. 264, 265.

investitive, *i. e.*, investing natural evidence with an artificial weight, and even, in some instances, attributing the property of evidence to that which, abstractedly speaking, has no probative force at all." <sup>1</sup>

In accordance with what was supposed to be weighty authority, it was recently suggested, by the writer, that "the principles of a deductive logic are not the sole guide of the judge or the advocate, for the reason, already intimated, that positive, municipal law has superimposed various, mainly exclusory, rules." <sup>2</sup> This submission has been made the subject of a spirited dissent, to the effect that "we are entitled to something a little more definite than this, after a discussion which cites from a large number of text-writers and authorities:

'But the principles of a deductive logic are not the sole guide of the judge or the advocate, for the reason, already intimated, that positive municipal law has superimposed various, mainly exclusory rules. The books are filled with reminders of the distinction between natural and judicial evidence, as also between logical and legal relevancy, but the observations there encountered are most frequently of a more or less vague and general character. . . .'

"The main function of the law of evidence is to exclude logically probative evidence. And while it may still be a subject of contention whether or not it is a proper use of language to assert that there are some things logically relevant which are not legally relevant, it is submitted that there is no basis for the suggestion lurking in the words

<sup>1</sup> Law of Evidence, § 34.

<sup>2</sup> Hints for Forensic Practice, p. 6; 1905.

'*mainly* exclusory,' in the above quotation, that anything can be legally relevant which is not logically relevant."<sup>1</sup>

The substance of this submission, with regard to the alleged, foundationless lurking suggestion, is, that the constituted rules of the law of evidence, in so far as they modify the process of natural reasoning, are wholly confined to restrictive or excluding provisions,—in other words, that, in no case, does the law of evidence operate additively, *i. e.*, create evidence which the *sensus communis* of reasoning humanity would never evolve, and which an enlightened reason repudiates.

If this be true, why the care, evidently taken by Bentham, Stephen, Best and Thayer, to express themselves guardedly, and confine their assertions as to the character and effect of the modifying rules, in question, by the use of one or another equivalent of the term, *mainly* exclusory?

Unless there be a misapprehension, it is supposed that a rule of evidence, relating to seals and consideration,—a single exception to the rule of exclusive exclusionariness being sufficient to divest "*mainly*" of its insidious error,—demonstrates that, in Best's assertion of the existence of rules "investing natural evidence with an artificial weight, and even, in some instances, attributing the property of evidence to that which, abstractedly speaking, has no probative force at all," doth appear the better reason.

"It is not for me to question the wisdom of the

<sup>1</sup> Columbia Law Review, vol. 6, No. 4, p. 287; April, 1906.

common law, in denying to a party, who has entered into an agreement under his hand and seal, a right to impeach it on the ground of a want of consideration. It is sufficient, that the law is so." <sup>1</sup>

"The rule has never been doubted, that the presence of a seal upon an instrument imports that it is founded upon a consideration." <sup>2</sup>

"The consideration is the very life of a simple contract, or parol agreement; while a specialty, or contract under seal, does not require a consideration, to make it obligatory at law, the law always presuming a sufficient consideration, which the parties, except in special cases, are estopped from denying." <sup>3</sup>

"Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of consideration unnecessary." <sup>4</sup>

Therefore, if a man *sign* a contractual paper,

<sup>1</sup> Per Spencer, Ch. J., in *Parker v. Wester v. Bailey*, 118 *id.* 193; *Snyder's Estate*, 7 *Kulp* (Pa.), 409; *Parmelee*, 20 *Johns.* 130, 134.

<sup>2</sup> 6 *Am. & Eng. Encycl. of Law*, *Schuylkill Nav. Co. v. Harris*, 5 762, citing: *Fallowes v. Taylor*, W. & S. (Pa.) 28; *Anderson v. 7 T. R.* 471; *Bunn v. Guy*, 4 *East*, Best, 176 *Pa. St.* 498.

190; *Patton v. Ashley*, 8 *Ark.* 290; <sup>3</sup> *Wharton, Law Lexicon*, 6th *Rutherford v. Bapt. Conv.*, 9 *Ga.* ed., 186.

54; *Brockway v. Harrington*, 82 <sup>4</sup> *Storm v. United States*, 94 *Iowa*, 23; *Ruth v. Ford*, 9 *Kans.* U. S. 76, 84. In New York, as 17; *Wing v. Chase*, 35 *Me.* 260; regards executory instruments, the *Ingersoll v. Martin*, 58 *Md.* 67; *fiat* is attenuated until it merely pro- *McMillan v. Ames*, 33 *Minn.* 257; vides for a rebuttable presumption, *Erickson v. Brandt*, 53 *id.* 10; arising from the presence of a seal, *Brewer v. Bessinger*, 25 *Miss.* 86; that a sufficient consideration *Angier v. Howard*, 94 *N. Car.* 27; passed (*Code Civ. Pro.* § 840).

without more, the rule of evidence, as to whether he ever was paid for it, is one way; but if he also affix a blotch of wax, or a scroll, the rule is the other! How does this "expound the Anglo-American law of evidence as a system of reasoned principles and rules" ?<sup>1</sup>

Hence, it is submitted that the basis for the suggestion, that a "thing can be legally relevant which is not logically relevant" is to be found in a citation of the authority noted.

*"Go with me to a notary, and seal me there your single bond."*

W. S.

<sup>1</sup> Wigmore, on Ev., Introduc.





## **APPENDIX I.**



## APPENDIX I.

OPINIONS OF SUPREME COURT OF THE UNITED STATES.

*Muhlker v. New York and Harlem Railroad Company.*<sup>1</sup>

ERROR TO THE SUPREME COURT OF THE STATE OF  
NEW YORK.

PLAINTIFF sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park avenue and One Hundred and Fifteenth street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park avenue, in front of said premises." The defendant, The New York and Harlem Railroad Company, is and was during all the times mentioned herein the owner of

<sup>1</sup> 197 U. S. Rep. 544: Decided April 10th, 1905.

a railroad and railroad structures in Park avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 702 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

"Fourth. That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new per-

manent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"Fifth. That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"Sixth. That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure

and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"Seventh. That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars (\$1,400) below what said rental value would have been during said period, if there had been no change in defendant's said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars (\$3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"Eighth. That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access

to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"Ninth. That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"Tenth. That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further the sum of \$3,000, with interest thereof from October 10, 1900. Damages were also adjudged to plaintiff in the sum of \$1,400, with interest from

February 16, 1897, and costs. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis v. New York & Harlem Railroad*, 162 N. Y. 202.

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

MR. JUSTICE MCKENNA, after stating the case, announced the judgment of the court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis v. New York & Harlem Railroad*, 162 N. Y. 202, both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defense made by the railroad companies of adverse possession as follows:

"The question of defendants having acquired title by adverse possession was considered by this



court in both the *Fries* and *Sander* cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had not title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis v. New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is, above ground, in front of the plaintiff's premises. The case of *Lewis* applies fully to the one at bar.' In the *Sander* case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four foot strip at least was established by the evidence.' "

In the case at bar there is a complete change of ruling by the Court of Appeals. The *Lewis* case is declared, in so far as it expressed rights of abutting property owners, to have been improvidently decided, and the elevated railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does

not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the *Lewis case* as to the use of the structure. It was there said: "When they (the railroads) commenced to use the steel viaduct they started a new trespass upon the rights of the abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in performing the duties devolved upon it a railroad may be required to exercise the right of eminent domain. *Wisconsin, Minn. & Pac. R. R. v. Jacobson*, 179 U. S. 287; see also *Mayor and Aldermen of Worcester v. Norwich and Worcester R. R.*, 109 Massachusetts, 103. We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to

be "in trust, nevertheless, that the same be appropriated, and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the *Lewis case*, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's property without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one

feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be as expressed by Bartlett, J., in his dissenting opinion, "\$3,000 fee damages, \$1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial; that is, \$4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something

of mockery to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett v. Johnson*, 15 N. J. Eq. 481, there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision." And, graphically describing the right, observed further, "is not every window and every door in every house in every city, town, and village the assertion and maintenance of this right?" It has been said *Barnett v. Johnson* anticipated "the principle upon which compensation was at last secured in the elevated railroad cases in New York." 1 Lewis Eminent Domain, 183.

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story v. New York Elevated R. R. Co.*,

90 N. Y. 122, and *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268, known as the elevated railroad cases. The *Lahr case* was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the elevated railroad cases was the *Story case*, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front streets in the city of New York, on which there were buildings. To their enjoyment light, air and access were indispensable, and were had through Front street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet, and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the

plaintiff; if it did, it was said, the judgment was invalid on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so, assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such"; and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the

court observed, "the lot became the dominant, and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land, on the *surface* of which the street is constructed, and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city, the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held



not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corn- ing v. Lowerre*, 6 Johns. Ch. 439, or the freight depot in *Barney v. Keokuk*, 94 U. S. 324.

The conclusion of the court and the distinctions made by it were repeated in *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268. The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the *Story case*," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the *Story case* had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury, if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt, and theme of renewed discussion." The doctrine of the *Story case* was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided.

There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the *Story case* and could not derogate from the title a property it conveyed, and, it was contended, that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged in the case at bar against the application of those principles. What are they? In the *Story* and *Lahr cases* the railroads were imposed for the first time on the street. In the case at bar the Harlem Railroad had occupied the surface of the street, and was changed to the viaduct. But in the *Story* and *Lahr cases* it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the *Story case*, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the *Story case*, and that case was distinguished thereby from the surface railway cases. And in

the *Lewis case* a difference was recognized between the two situations, and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The *Lewis case*, as we have seen, was overruled by the Court of Appeals in the case at bar, while the *Story* and *Lahr cases* were said not to be in point. We think that the *Lewis case* was an irresistible consequence of the others, and the *Story* and *Lahr cases* are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defense was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the elevated railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest

to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and, hence, under compulsion of law," to quote from the Court of Appeals. The public interest, therefore is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument, it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the *Story case* that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes v. R., W. & O. R. Co.*, 121 N. Y. 505, where a steam railroad was permitted upon a street without liability for consequential damages to adjoining property. The

new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the elevated railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have

the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the elevated railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91c, and, it is there said, "established beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

*Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.*

MR. JUSTICE BROWN concurs in the result.

MR. JUSTICE HOLMES, dissenting:

I regret that I am unable to agree with the

judgment of the court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding of the court of first instance and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries v. New York & Harlem R. R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is, that on this state of facts, as was held in the similar case of *Fries v. New York & Harlem R. R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to dis-



tinguish the case from the elevated railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story v. New York Elevated R. R.*, 90 N. Y. 122, 160, 170, 178; *Lahr v. Metropolitan Elevated Ry.*, 104 N. Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that, notwithstanding the facts specifically found, the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantages of the expectation that a street would remain open and a right *in rem* that it should remain so. See *Stanwood v. Malden*, 157 Massachusetts, 17. Again, more narrowly, if the New York courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have

been alone in the world of the common law. *Keats v. Hugo*, 115 Massachusetts, 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barnett v. Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson v. Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same courts as against the same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the elevated railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque*, 1 Wall. 175, and *Louisiana v. Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this court a good while to explain. The doctrine now is explained, however, not to mean that a change in the deci-

sion impairs the obligation of contracts, *Burgess v. Seligman*, 107 U. S. 20, 34; *Stanly County v. Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the elevated railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co. v. Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the elevated railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that

when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now is open to travel, and that an impassable barrier along its width has been removed, in other words, that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton v. Wheeler*, 179 U. S. 141; *Gibson v. United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the

Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot believe that whenever the Fourteenth Amendment or Article I, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. I cannot believe that we are at liberty to create

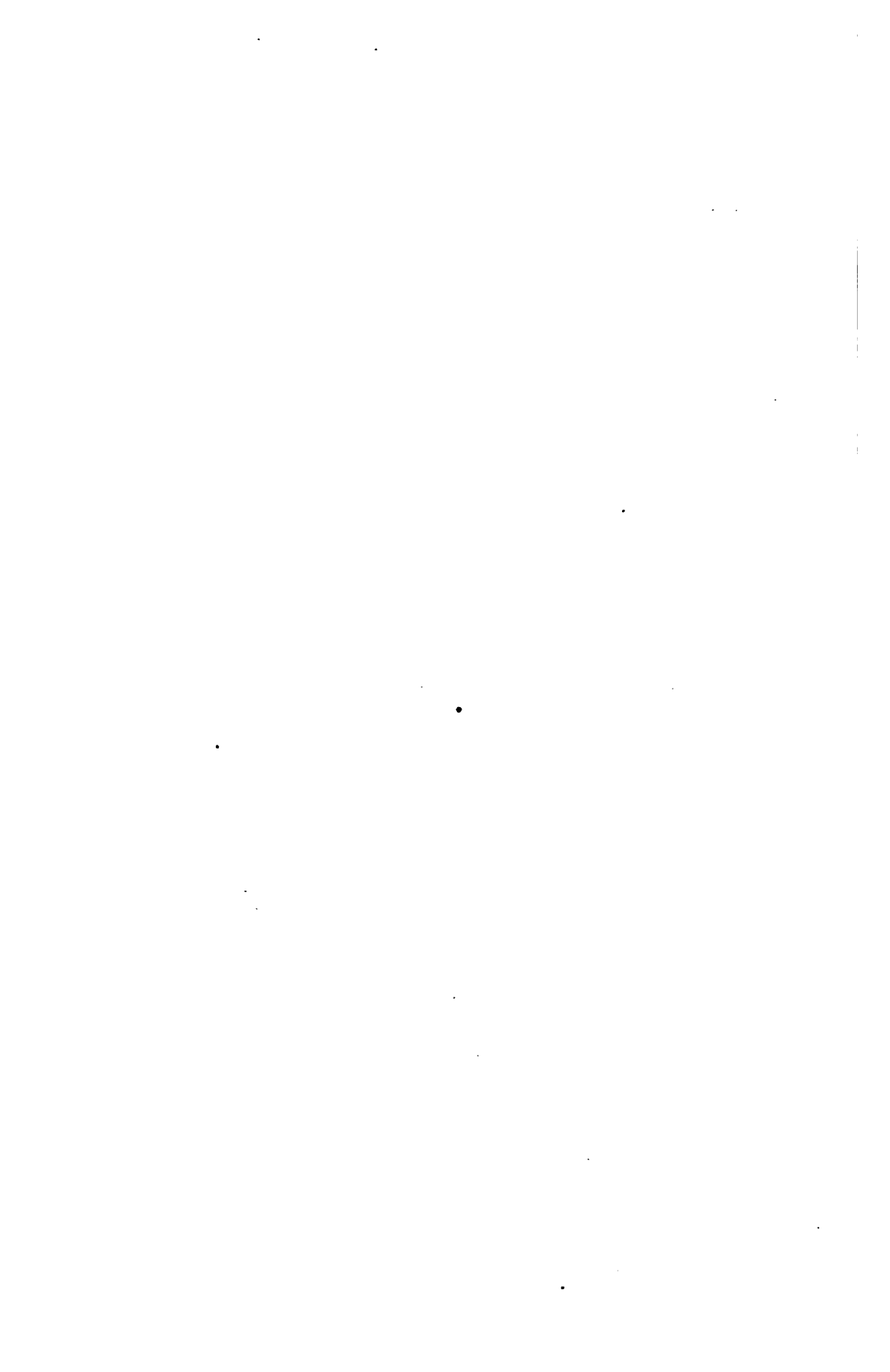
rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff had an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation. Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I

have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton v. Wheeler*, 179 U. S. 141; *Meyer v. Richmond*, 172 U. S. 82; see *Mugler v. Kansas*, 123 U. S. 623, 668; *Marchant v. Pennsylvania R. R.*, 153 U. S. 380; *Camfield v. United States*, 167 U. S. 518, 523; *People v. D'Oench*, 111 N. Y. 359, 361; *Sawyer v. Davis*, 136 Massachusetts, 239; *Commonwealth v. Alger*, 7 Cush. 53. Compare *United States v. Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in the foregoing dissent.

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## APPENDIX II.



## APPENDIX II.

### OPINION OF THE SECOND DIVISION OF THE COURT OF APPEALS.

#### *Abendroth v. N. Y. El. R. R. Company.*<sup>1</sup>

FOLLETT, Ch. J. The principal questions in- 1  
volved in this appeal are: (1) Has the plaintiff,  
by his ownership of a lot abutting on Pearl  
street, private rights or rights of property  
therein? (2) Have the defendants taken or ma-  
terially impaired those rights, if any the plaintiff  
has, within the meaning of the Constitution?  
The term "abutting owner" will be used in 2  
this judgment to denote a person having land  
bounded on the side of a public street and hav-  
ing no title or estate in its bed or soil, and no  
interests or private rights in the street except  
such as are incident to lots so situated. The 3  
evidence upon which the facts were found not  
appearing in the record, the findings of the trial  
Court must be accepted as true. In addition to 4  
the finding that the plaintiff's lot does not ex-  
tend beyond the line of the street, it should be  
noted that there is no finding that the plaintiff  
or any one of his predecessors ever had any  
title to or estate in the land whereon this street  
is maintained, or any interest in the street ex-

<sup>1</sup> 122 N. Y. Rep. 1: Decided October 7th, 1890.

5 cept that of an abutting owner. The view  
taken of the rights of abutting owners renders  
it unnecessary to consider the much debated  
and interesting historical question as to whether  
the Island of Manhattan was, within the law  
of nations, so discovered, settled, subjugated or  
possessed by the United Provinces as to impress  
upon it and its inhabitants the law of that  
country and the general rule of the civil law,  
that the title to the soil of highways and the  
6 beds of public streets is in the government. If  
the plaintiff, by virtue of being an abutting  
owner, has not sufficient private rights or inter-  
ests in this street to have enabled him to have  
maintained an action for the injuries found to  
have been inflicted, or for similar injuries in-  
flicted without legislative authority, then he is  
7 without remedy in this case. In the cases  
about to be referred to, the plaintiffs were not  
all abutting owners, but none of them owned  
the part of the street whereon the obstruction  
or encroachment was placed which was the  
8 cause of the injury complained of. In *Corning*  
*v. Lowerre* (6 Johns. Ch., 439), the owner of a  
lot on Vestry street was held entitled to main-  
tain an action to restrain the defendant from  
9 obstructing the street. In *Van Brunt v. Ahearn*  
(13 Hun, 388), the parties owned lots on Cath-  
10 arine street in Brooklyn. The defendant ob-  
structed the street at a point some distance  
from the plaintiff's lot, causing him special dam-  
ages, and it was held that the plaintiff had such

a private right, the right of free ingress and egress, that he could maintain an action to recover his damages and restrain the continuance of the obstruction.

In *Crooke v. Anderson* (23 Hun, 266), the 11 parties owned lots on Washington avenue in the City of Brooklyn, and the defendant encroached (not obstructed) on that part of the street which was in front of his lot, so that the street was less convenient for the plaintiff's use in going to and from his lot, thus specially damaging the plaintiff, and it was held that he could maintain an action to abate the encroachment.

In *Fanning v. Osborne* (34 Hun, 121; 102 12 N. Y., 441), the plaintiff was an abutting owner on Garden street in the City of Auburn, and the defendant, without legislative authority, maintained a railroad track in the street, over which cars were drawn by the power of steam. It was held that the plaintiff (he showing that 13 he had sustained special damages) had a sufficient private right in the street to maintain an action to restrain the operation of the railroad. The same doctrine was held in *Hussner v. B. 14 C. R. R. Co.* (114 N. Y., 433).

In *Callanan v. Gilman* (107 N. Y., 360), two 15 abutting owners on Vesey street in the City of New York were engaged in business in adjoining stores. It was held that the plaintiff could, by 16 action, restrain the defendant from improperly obstructing the sidewalk by using a temporary

bridge or plankway by which goods were taken from and into the store, and thus causing a special injury or damage to the plaintiff.

- 17 In *Stetson v. Faxon* (19 Pick., 147), the parties owned adjoining lots in the City of Boston, which were bounded north by Ann street and south by a street running along the north side  
18 of Market square. The city laid out a new street south of the last mentioned one, and sold to the defendant the land between his lot and the new street, which had formed a part of the  
19 old street. The defendant erected fences and buildings on the land so purchased which impaired the value of the plaintiff's property by rendering it less convenient of access and ob-  
20 scuring the view. In an action to recover damages it was held that the old street not having been legally discontinued, the defendant was  
21 liable. The principle running through these cases has been maintained in England for at least two hundred years (*Maynell v. Saltmarsh*, 1 Keb., 847; *Fritz v. Hobson*, L. R. [14 Ch.  
22 Div.], 542). The same rule has been held applicable to country highways (*Pierce v. Dart*, 7 Cow., 609; *Hood v. Smith*, 5 Wkly. Dig., 117), and has received the sanction of the Courts of most of the States of the Union (Ang. High.,  
23 sec. 285). These cases do not rest on the fact that the wrongs happen to amount to public nuisances, for no person can maintain a private action for the recovery of damages against the creator or maintainer of a public nuisance un-

less it occasions him special damages by an immediate injury to his person or property, or by a consequential injury to his property (*Lansing v. Smith*, 8 Cow., 146; 4 Wend., 10; *Wood on Nuis.*, 655). All of these cases were for the recovery of consequential damages to real property bounded by the side or center of the street, or for the recovery of such damages sustained by occupants of such property, and in none of the cases were the obstructions or encroachments on or opposite to the property of the plaintiff. There are important differences between the case at bar and those cited. In the cases referred to, the acts which were held to be objectionable wholly or partly obstructed the streets and rendered the property of the plaintiffs less accessible, and none of them were done pursuant to legislative authority; while in the case at bar the acts complained of were done pursuant to such authority, and do not, as found by the Court, impair in any substantial degree the accessibility of the plaintiff's premises. But these cases do establish the principle that the owner of a lot on a public street, whether it extends across to the center, or only to the side of the street, has incorporeal private rights therein which are incident to his property which may be so impaired as to entitle him to damages. If this be not so, it is difficult to see how he can maintain any action except such as can be maintained by a stranger for an immediate injury to person or property

caused by an obstruction while lawfully traveling in the street. The judgments in *Story v. N. Y. E. R. R. Co.* (90 N. Y., 122); *Lahr v. M. E. R. Co.* (104 *id.*, 268) seem to compel this conclusion. In *Story's* case importance was given to the language of a covenant contained in the grants dividing and conveying the lots forming a larger tract owned and granted by the city (of which *Story's* lot was a part), and to chapter 86 of the revised laws of 1813, under which the street was laid out. But the judgment in *Lahr's* case was not placed on the ground that any rights in or to the bed of the street, had been granted or reserved to him, or to any of his predecessors; and it was held, some force being given to the Act of 1813, that he had rights of property in the street.

The learned judges who delivered the dissenting opinions in *Story's* case did not deny, but rather assumed that the abutting owner had rights of property in the street, and held that those of the public were paramount, that the rights of both arose and existed by virtue of the same authority, and that those of the abutting owner could, by legislative and municipal action, be further subordinated to the rights of the public for the purpose of affording additional and necessary facilities for the transportation of persons and property through the street. Since *Story's* case was decided, questions akin to the one under consideration have been discussed by the Court of Appeals. In



Mahady's case (91 N. Y., 153), ANDREWS, J., in delivering the opinion of the Court, said: "The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street and neither the legislature nor the city could devote it to purposes inconsistent with street uses, without compensation, according to the principle of *Story v. N. Y. E. R. R. Co.* (90 N. Y., 122)." Again, the same learned judge, in delivering 35 the opinion in *Pond's case* (112 N. Y., 188), said: "The *Story case* (90 N. Y., 122) established the principle that an abutting owner on streets in the City of New York possesses, as incident to such ownership, easements of light, air and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation."

In *Powers v. M. R. Co.* (120 N. Y., 178), 36 BROWN, J., in his Opinion, said: "The facts of the *Story case* were not broad enough to necessarily cover the case of an abutting owner whose only property in the street was an easement for light, air and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. M. E. R. Co.*" The cases 37 last cited did not, perhaps, involve the question discussed in the remarks quoted; but it cannot be assumed that they were made with-

out deliberation, for since Story's case this precise question has been much debated and hardly out of the minds of the Judges of the Court of last resort.

- 38 The judgments for damages which have been recovered and sustained against the elevated roads do not and cannot rest on the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists and is specially injured by
- 39 it. The only remaining ground upon which they can, and do stand, is that, by the common law, the plaintiffs had private rights in the streets before the roads were built or authorized to be built. It is clear, we think, that
- 40 these rights were not created by the statutes under which the corporations were organized, nor by the construction of the road; nor do they exist by force of the judgment in Story's case; but they existed anterior to the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations.
- 41 It being established that an abutting owner has property rights in the streets and that an action could have been maintained against the defendants for the recovery of the damages caused by their acts, had they been done without legislative authority, it becomes material to inquire whether such right of action is cut off

because the road was constructed pursuant to such authority.

The Constitution of this State provides: 42  
 "Nor shall private property be taken for public use without just compensation" (Art.1, § 6).

It is settled by Story's case and Lahr's case 43  
 that such rights as the plaintiff has in Pearl street "are private property" within the meaning of the constitutional provision quoted; and these cases also hold that, by the construction and operation of an elevated road in the street in front of an owner's premises, his rights are "taken for public use," within the meaning of the Constitution. It follows that 44  
 the authority conferred by the legislature to construct the road is not a defense to the action.

Fobes v. R. W. & O. R. R. Co. (121 N. Y., 45  
 505) does not decide that an abutting owner has not vested rights to light, air and access in a public street, which are incident to his lot and which are private property within the meaning of the Constitution; but that the operation, pursuant to legislative authority, by the defendant of its steam railroad on the grade of the street which was at about the natural surface of the ground, was not an actionable invasion of the abutter's right. The 46  
 learned judge who wrote the Opinion in that case thus defined the limits of the question to be discussed: "It (defendant) admits that plaintiff had an easement in that street, but it de-

- nies that it has occupied or appropriated it.
- 47 Whether it has taken any portion of the plaintiff's easement in the street in question, is what the defendant asks shall be decided by us, and it denies *in toto* any taking whatever of the plaintiff's property or any portion thereof."
- 48 The conclusion which we arrive at is, that the erection and operation of the elevated road in Pearl street immediately in front of the plaintiff's premises in the manner and with the effect described in the findings of fact, was a material impairment of the plaintiff's right of property, for which he is entitled to recover compensation for the damages inflicted.
- 49 It is urged that if the plaintiff ever had a right of action, it has been lost by his acquiescence in the construction and use of the
- 50 road by defendant. It is found that when the road was being built through this street the plaintiff forbade the New York Elevated Railroad Company to construct it, and threatened that corporation with litigation, but began no action until this suit was commenced, and in the meantime he has occasionally been a fare
- 51 paying passenger on the road. Had this action been brought in equity solely for the purpose of compelling the defendants to remove their structure, and if all persons having such interests in the elevated road as would entitle them to be heard before such relief could be granted, were parties to the action, personally, or representatively, this question might require some

consideration; but in an action for the recovery of damages the conduct of the plaintiff, as found by the Court, and his delay in bringing the action, is not a defense.

The order should be affirmed and judgment 52 absolute rendered against the appellants, with costs.

All concur.



## INDEX.

	PAGE
ABENDROTH CASE,	
private easement in street accorded by.....	215
opinion in.....[app'x]	35
ABROGATION	
of adoption .....	167
ABUTTING OWNER,	
rights of, in street protected by U. S. Con-	
stitution. ....	7
defined, .....	253
ACTION	
at law, original of.....	123
for taking private light and air, essentials in..	313
ADOPTION	
of infants, mode of, prescribed.....	162
AIR	
and light, in street, taking of, for railroad station	203
ALIENATION	
of real property, suspension of power of.....	103
APPORTIONMENT	
of the sovereignty of the States of the Union..	62
ARISTOTLE,	
<i>dictum</i> of, utilized.....	242
AUSTIN,	
on term "property".....	259
BAYLIES,	
on nature of nonsuits.....	147

	PAGE
BEST,	
on character of judicial evidence rules.....	357
CAINES,	
on enumerated motions.....	92
CHITTY,	
on nature of nonsuits.....	126
CLOUD	
on title, action to remove, unlimited.....	340
CODIFICATION	
in New York.....	156
COKE,	
on nature of nonsuits.....	124, 139
COMPENSATION,	
in eminent domain.....	173
CONFLICT	
of law, in eminent domain of air, etc., in street	190
CONGRESS	
of United States, recommendations to.....	83
CONSIDERATION,	
seal as evidence of.....	357
CONSTITUTION	
of United States, distribution of powers by....	65
CONTRACT	
defined; kinds of.....	25
what is obligation of, within meaning of United	
States Constitution.....	29
DAMNUM	
absque injuria, illustration of.....	15
limits of.....	195, 220



	PAGE
DECISION	
of State Court, effect of variant construction of	
contract by.....	29
constitution of obligation of con-	
tract by.....	51
DELAY,	
the law's.....	324, 325
DICTA	
classified.....	306, 307
DISCONTINUANCE	
of action, in England.....	152
DISMISSAL	
of complaint, when a nonsuit.....	146, 147
DOLAN CASE,	
railroad station above city street.....	209
DOMESTIC RELATIONS LAW	
of New York.....	154
DUE PROCESS OF LAW	
clause of United States Constitution, to whom	
addressed.....	2
DUNLAP,	
on enumerated motions.....	93
EASEMENTS	
in city street, as private property.....	176
EMINENT DOMAIN,	
effect of Fourteenth Amendment of United	
States Constitution on.....	9
not exercisable for a private use.....	10
exercised on light and air.....	170
ENGLISH	
law, of private right to use public street...	280-285
statutes of limitation of action.....	327, 328

	PAGE
ENUMERATED	
motions, what are.....	89
EQUITY	
follows the law, and <i>vice versa</i> .....	327
ESTATE	
defined.....	255
ESTATES	
in expectancy, in real property.....	108
EVIDENCE	
and pleading, relation of.....	343
law of, characterized.....	354
EVOLUTION	
of law, relative to abutter's rights in street....	38
of federal executive.....	82
EXECUTIVE,	
federal, nature of.....	57
powers of federal government, how vested....	67
FEDERAL	
executive, nature of.....	57
to take oath to execute office .....	81
FEDERALIST,	
testimony of, as to defects of Confederation....	76
FEDERATION	
of States, <i>locus</i> of sovereignty in.....	59
FOURTEENTH AMENDMENT	
of United States Constitution, to whom ad- dressed .....	2
FUTURE	
estates in real property defined.....	108
GRAHAM,	
on nature of nonsuits.....	125

## INDEX.

51

	PAGE
<b>GUARDIAN</b>	
and ward, in New York.....	159, 160
in socage, survival of .....	160
<b>HICKOK,</b>	
on the constitution of the human mind.....	345
on syllogistic processes.....	347
<b>IMPAIRMENT</b>	
of obligation of contract by State law.....	2
<b>INDUCTIVE</b>	
process, reasoning in connection with.....	350
<b>INFANTS,</b>	
adoption of.....	162
<b>INHERITANCE</b>	
from foster parents.....	164
<b>INVASION</b>	
of property, instance of,.....	251
<b>JEFFERSON</b>	
prophecy of recalled.....	73, 88
<b>JUDGMENT</b>	
of State court, denying due process of law.....	12
of nonsuit, form of.....	139, 150
<b>JUDICIAL</b>	
powers of federal government, how vested....	67
logic, processes of.....	350
<b>LAHR CASE,</b>	
effect of, as declared by United States Supreme Court.....	7
analysis of decision in.....	19
nature of contract disclosed by.....	33

	PAGE
LEARNED PROFESSIONS	
compared .....	342
LEGISLATIVE	
powers of federal government, how vested....	67
LIMITATION	
of action, and limitations in actions .....	324
LINCOLN,	
as federal executive .....	79
LOGIC,	
legal non- .....	342
MAGISTRATE,	
meaning of .....	74
MAGNA CHARTA	
of 1215, on rendition of justice .....	324
MATTER	
and force, relation of .....	345
MENTAL	
capacities and faculties enumerated .....	345
MOTION,	
what is a .....	99
enumerated, discussion concerning .....	89, 99
origin of appellation .....	91
MUHLKER CASE,	
allegations of complaint in .....	3
in United States Supreme Court, grounds of	
decision of .....	6, 30, 54
nature of contract disclosed by .....	39
opinions of United States Supreme Court	
in .....	[app'x] 3
NONSUITS,	
old and new, compared .....	122

## INDEX.

53

PAGE

NUISANCE,	
private action for public.....	273, 279, 291, 300
OBITER DICTA	
defined and classified.....	306, 307
OBLIGATION	
of contract, who forbidden to impair.....	2
what is within meaning of United	
States Constitution.....	29
PARK AVENUE	
improvement, constitutionality of,.....	174, 176
PLANTAGENET	
rulers, relation of, to federal executive.....	72
PLEADING	
of statutes of limitation of action.....	332
PROXIMITY	
generative of property.....	263
RADCLIFF	
case, illustrative of <i>damnum absque injuria</i> ....	22
RAILROAD	
viaduct over street, effect of, on abutter's rights	47
station above city street, law of.....	192
REAL PROPERTY LAW	
of New York, a phase of, considered.....	103
REASON	
and reasoning, relation of.....	353
RELEVANCY,	
legal <i>versus</i> logical.....	356
SEAL	
and consideration, in law of evidence.....	357

	PAGE
SENTENCE	
of railroad corporation for refusing to run trains	207
SOVEREIGNTY,	
political, defined.....	57
STATUS	
defined.....	255
STATUTE	
of limitation of action, what is a.....	329
a peculiar.....	335
STEAM	
railroad in street, immunity of.....	310
STORY CASE,	
effect of, as declared by United States Supreme Court .....	7
analysis of decision in .....	16
nature of contract disclosed by.....	31
STREET	
railroads take no property.....	231, 235
uses restricted.....	237
SUIT,	
original of.....	122
SUPREME COURT	
of New York, division of.....	315
SUSPENSION	
of power of alienation of real property.....	103
SYLLOGISM	
described and analyzed.....	347
inverted, described and analyzed.....	348
TAX-DEED,	
peculiarities of a.....	337
THELLUSSON	
will re-legalized.....	119

**INDEX.**

**55**

**PAGE**

**TIDD,**

on nature of nonsuits..... 135

**TITLE**

defined..... 255

**TRUST**

of real property, when power of alienation sus-  
pended by.....109, 111

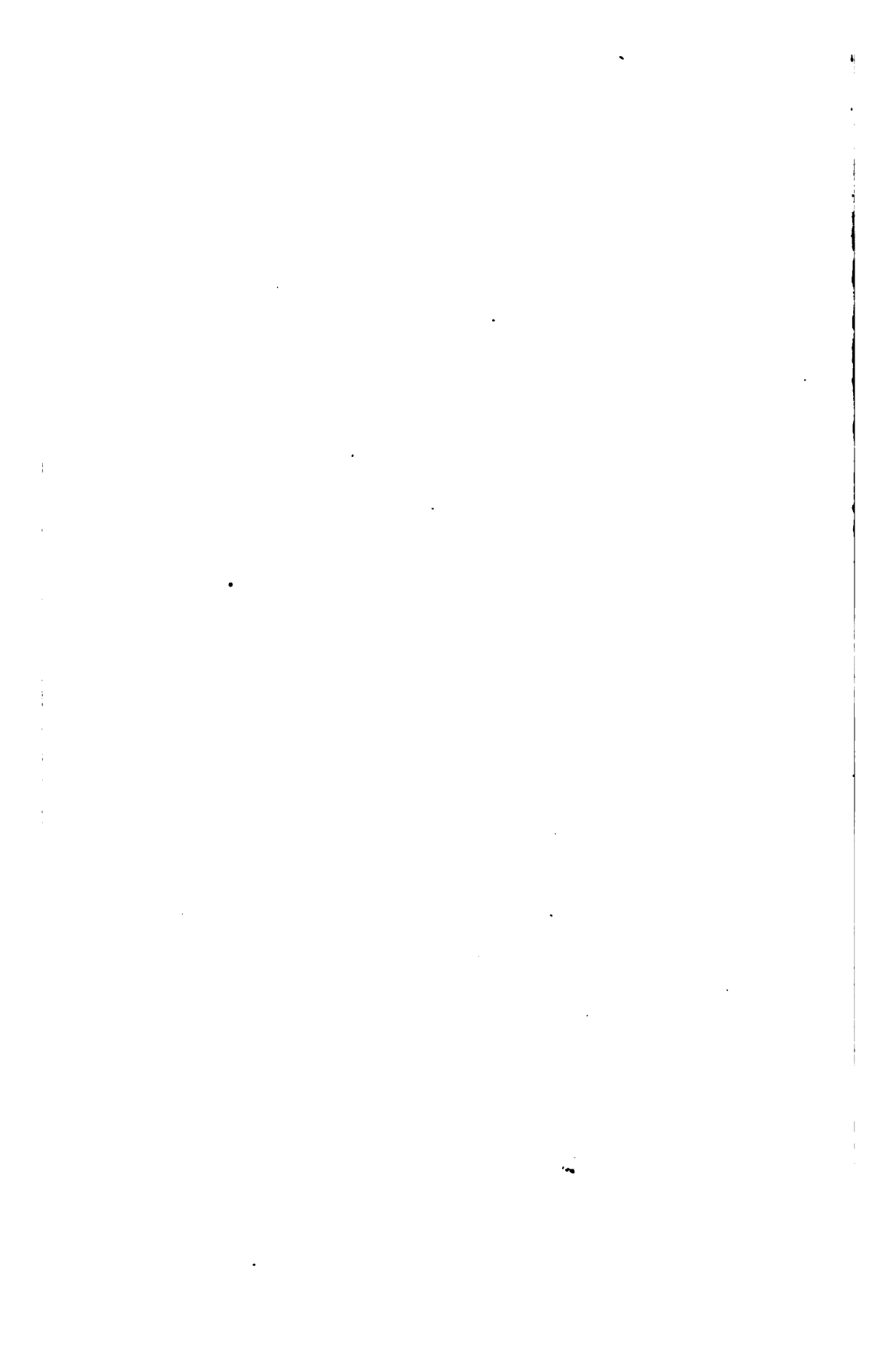
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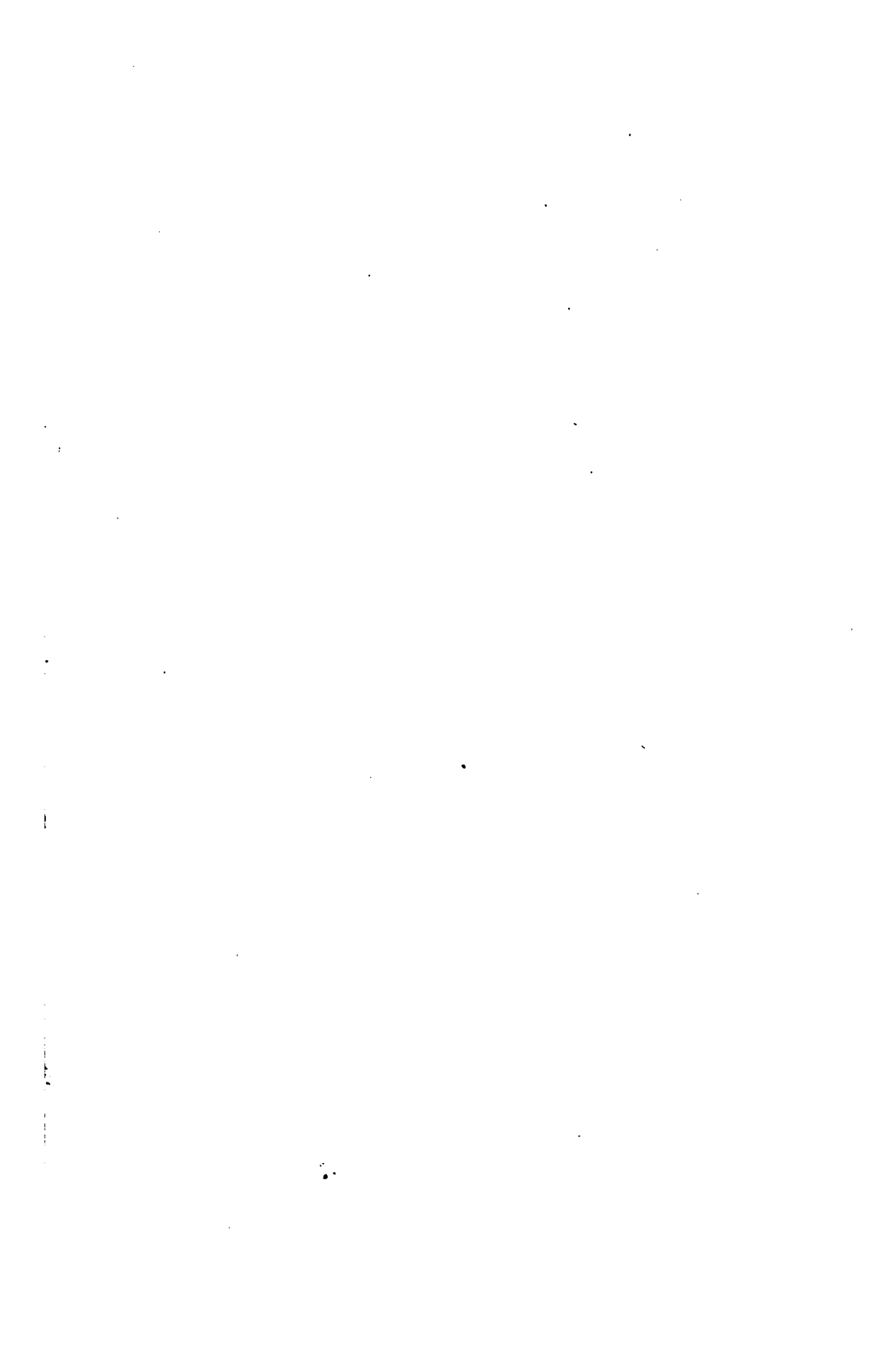
right, in immutability of State decision..... 56  
nature of..... 294











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